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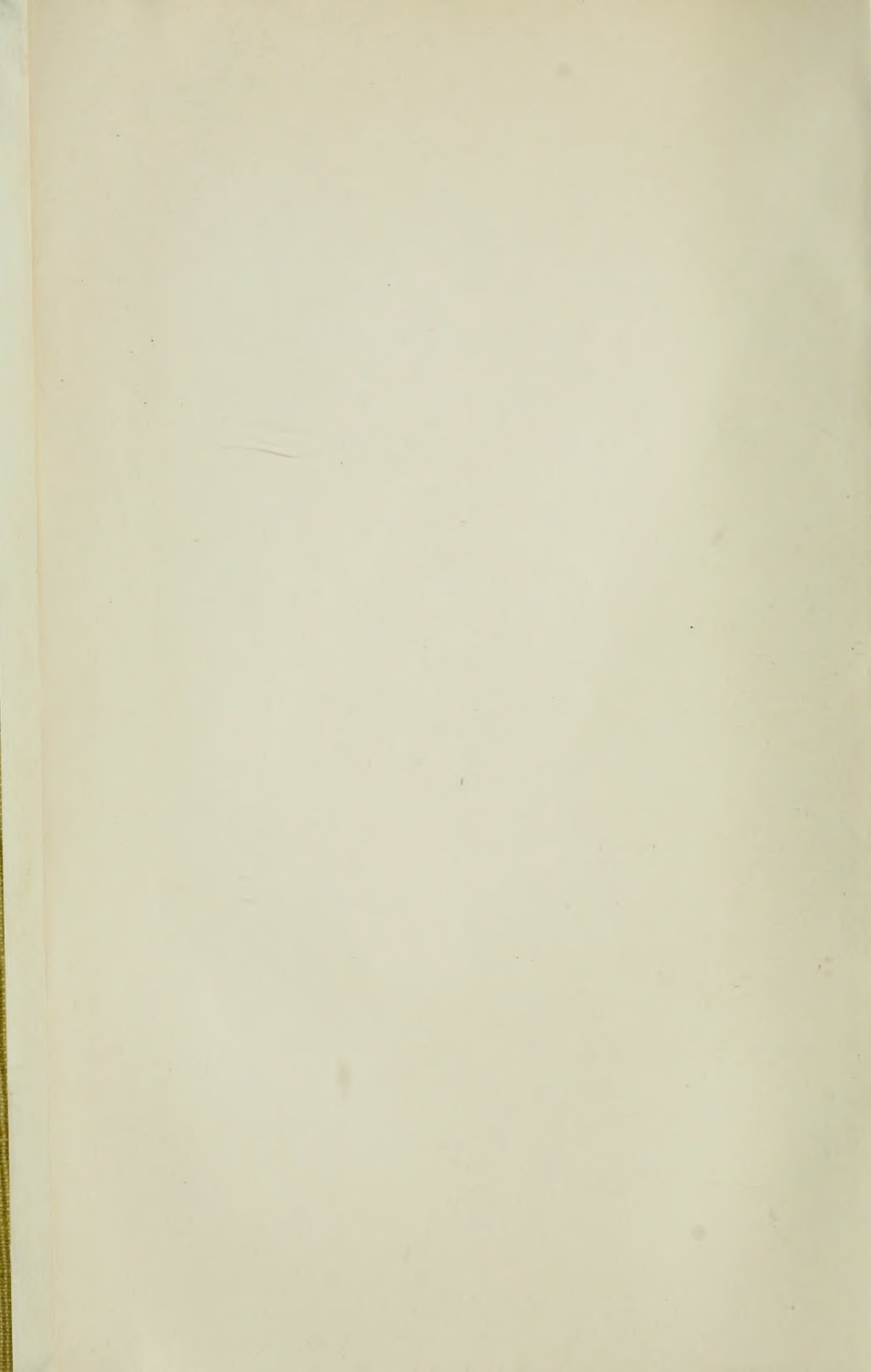
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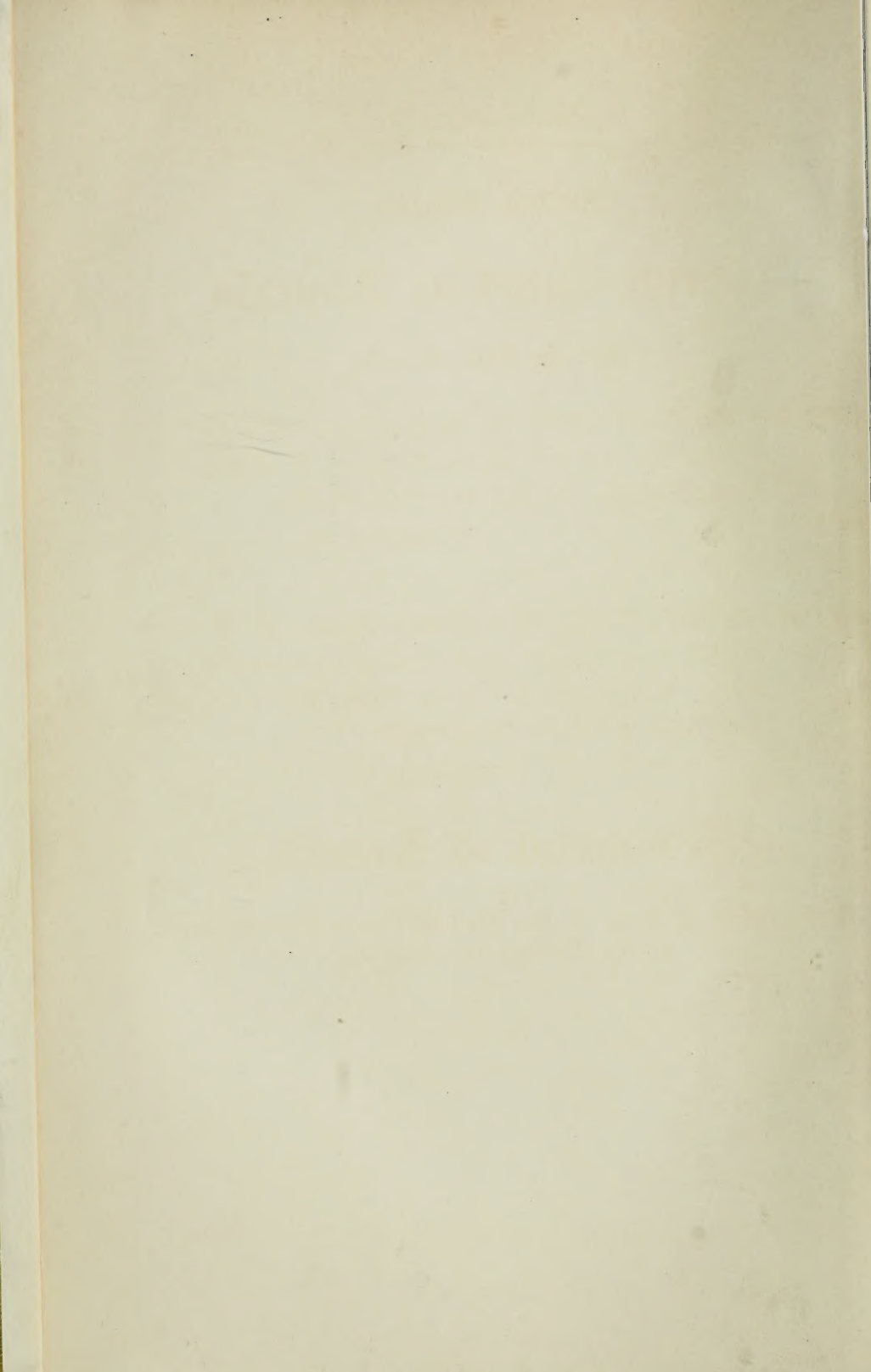
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827
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No. 2290

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE CITY OF FORSYTH, an Incorporated City
of the Third Class of the State of Montana,
Formerly the **TOWN OF FORSYTH**,

Plaintiff in Error,

vs.

E. W. CRELLIN, **W. H. JACKSON**, and **B. N. MOSS**, Copartners Doing Business Under the
Firm Name and Style of **DES MOINES**
BRIDGE & IRON COMPANY,

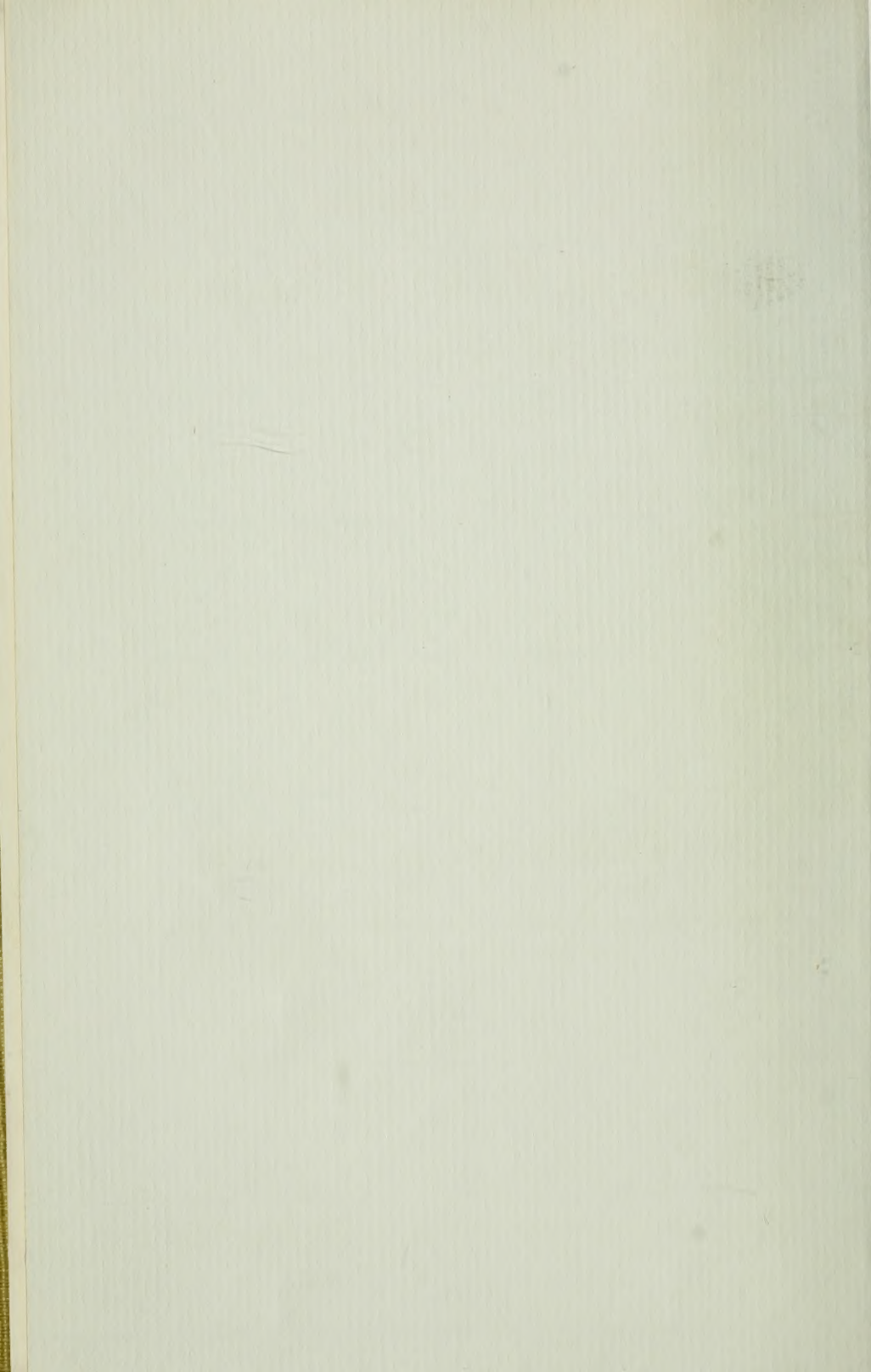
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.

FILED

AUG 26 1913



Records of U. S. Circuit
Court of Appeals
F27

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE CITY OF FORSYTH, an Incorporated City
of the Third Class of the State of Montana,
Formerly the TOWN OF FORSYTH,

Plaintiff in Error,

vs.

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Defendants in Error.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Replication.....	35
Amendment to Complaint.....	33
Answer.....	21
Answer of Court to Writ of Error.....	79
Assignment of Errors.....	72
Attorneys of Record, Names and Addresses of..	1
Bill of Exceptions.....	49
Bond.....	75
Certificate of Clerk U. S. District Court to Rec- ord, etc.....	81
Citation on Writ of Error (Original).....	80
Complaint.....	2
Counterclaim, Further Answer and.....	43
Demurrer.....	19
EXHIBITS:	
Exhibit "A" to Complaint—Contract.....	9
Further Answer and Counterclaim.....	43
Judgment.....	45
Memorandum Order Overruling Demurrer, etc..	47
Names and Addresses of Attorneys of Record..	1
Order Allowing Writ of Error and Fixing Amount of Bond Thereon.....	75

Index.	Page
Order Overruling Demurrer.....	20
Order Overruling Demurrer, Memorandum.....	47
Order Settling, Allowing and Approving Bill of Exceptions.....	71
Petition for a Writ of Error and Supersedeas of the Defendant, The City of Forsyth.....	74
Replication.....	30
Stipulation as to Bill of Exceptions.....	70
Summons.....	16
TESTIMONY ON BEHALF OF PLAINTIFF:	
FARR, GEORGE W.	52
Cross-examination.....	53
Redirect Examination.....	57
Recross-examination.....	57
SMITH, HENRY W.....	58
Cross-examination... ..	59
Redirect Examination.....	60
TESTIMONY ON BEHALF OF DEFEND- ANT:	
BLUM, B.....	65
COLLINS, F. V. H.....	66
ERWIN, E. H.....	61
Cross-examination.....	62
MURI, D. J... ..	63
Cross-examination... ..	64
Redirect Examination.....	65
Writ of Error (Original).....	78

Names and Addresses of Attorneys of Record.

F. V. H. COLLINS, Esq., of Forsyth, Montana,
Messrs. GUNN, RASCH & HALL, of Helena, Montana,

Attorneys for Defendant and Plaintiff in
Error.

EDWARD HORSKY, Esq., of Helena, Montana,
Attorney for Plaintiff and Defendant in
Error.

*In the District Court of the United States in and for
the District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Copartners, Doing Business Under the
Firm Name and Style of the DES MOINES
BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City
of the Third Class of the State of Montana,
Formerly the Town of Forsyth,
Defendant.

BE IT REMEMBERED that on the 15th day of
April, 1911, the complaint was filed herein, being as
follows, to wit: [1*]

*Page-number appearing at foot of page of original certified Record.

Index.	Page
Order Overruling Demurrer.....	20
Order Overruling Demurrer, Memorandum.....	47
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Petition for a Writ of Error and Supersedeas of the Defendant, The City of Forsyth.....	74
Replication.....	30
Stipulation as to Bill of Exceptions.....	70
Summons.....	16
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Cross-examination.....	53
Redirect Examination.....	57
Recross-examination.....	57
SMITH, HENRY W.....	58
Cross-examination... ..	59
Redirect Examination.....	60
TESTIMONY ON BEHALF OF DEFEND- ANT:	
BLUM, B.....	65
COLLINS, F. V. H.....	66
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Redirect Examination.....	65
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Attorneys for Defendant and Plaintiff in
Error.

EDWARD HORSKY, Esq., of Helena, Montana,
Attorney for Plaintiff and Defendant in
Error.

*In the District Court of the United States in and for
the District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Copartners, Doing Business Under the
Firm Name and Style of the DES MOINES
BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City
of the Third Class of the State of Montana,
Formerly the Town of Forsyth,
Defendant.

BE IT REMEMBERED that on the 15th day of
April, 1911, the complaint was filed herein, being as
follows, to wit: [1*]

*Page-number appearing at foot of page of original certified Record.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

E. W. CRELLIN, W. H. JACKSON, and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,
Defendant.

Complaint.

Now comes the plaintiffs in the above-entitled action, and for cause of action against defendant complain and allege:

1. That plaintiffs, E. W. Crellin, W. H. Jackson, and B. N. Moss, are now, and were during all the times hereinafter mentioned, copartners, doing business under the firm name and style of the Des Moines Bridge & Iron Company, with their headquarters and principal place of business in the city of Des Moines, in the State of Iowa; that they and each of them are residents and citizens of the State of Iowa; that the amount in controversy in this suit exceeds the sum of \$2,000.00, exclusive of interests and costs.

2. That the City of Forsyth, the defendant herein, is now an incorporated city of the third class of the State of Montana, and was at a time prior to the commencement of this action, an [2] incorporated town in the State of Montana.

3. That on or about the 25th day of May, 1907, the said defendant entered into a certain contract in writing with the plaintiffs herein, for the construction, building and erection of a certain waterworks system and plant in the said town, now city, of Forsyth, a copy of which contract is hereto attached, marked Exhibit "A," and hereby made a part of this complaint.

4. That in and by the terms and conditions of said contract, plaintiffs herein agreed to furnish all of the material and labor, necessary for the construction of, and to construct a waterworks system and plant in the town, now city of Forsyth, according to the detailed plans, specifications and drawings thereof by the Iowa Engineering Company of Clinton, Iowa, the engineers of the said town, in the planning of said waterworks system and plant, and filed in the office of the Town Clerk of said town, at and for the consideration and compensation agreed to be paid to the said plaintiffs, by the town, now city of Forsyth, as set forth and described in said contract; that immediately after the execution of said contract, and on or about the 25th day of May, 1907, plaintiffs under, in pursuance, and by, and by virtue of said contract and the said plans, specifications and drawings therein referred to, commenced the work and labor on said water plant and system, and commenced the furnishing of the materials, machinery and fixtures necessary for and to be used in the construction of the same, according to the terms and conditions of said contract, plans, specifications and drawings, and continued thereafter in the perform-

ance of such labor and work and the furnishing of such materials, machinery and fixtures, and duly performed all the terms, stipulations and conditions of said contract, plans, specifications and drawings, on their part to be performed, and that said waterworks system and plant were fully completed by plaintiffs, and [3] turned over to defendant, and the same duly accepted by the said defendant, and that said defendant is now, and ever since the said acceptance thereof, has been in full and absolute control of the same and the whole thereof.

5. That at the said contract prices for said work and labor, and for materials, machinery and fixtures to be, and which were furnished, in the construction and building of said waterworks system and plant, by plaintiffs to defendant, at its request and under its orders, and by virtue of the terms of said contract, the total amount due and to be paid plaintiffs, was the sum of \$38,827.26.

6. That from time to time during the progress of the construction of said water plant, as contemplated in said contract, various estimates were made of work done and material furnished, and duly presented to the defendant, which were allowed and paid by said defendant to said plaintiffs under the terms of said contract, the sum of \$31,460.44.

7. That the said contract was fully completed by the plaintiffs herein, and the said waterworks and system were turned over to the said defendant on or about the 30th day of April, 1908, and duly accepted by said defendant as being completed under and in accordance with the terms of said contract, and that said defendant has ever since said date had the sole

and exclusive possession and control of said water-works plant and system, and has used the same for the purpose intended.

8. That on or about the — day of April, 1908, plaintiffs presented an itemized statement in writing to the said City Council of the said defendant, in the form of a final estimate, account and claim for materials furnished and labor performed under the terms of said contract, which said itemized statement in writing, final estimate, account and claim was in the words and figures following, to wit: [4]

“April 28, 1909.

Honorable Mayor and Council,

Forsyth, Montana.

Gentlemen:

Having entirely completed our waterworks contract with your city we hereby submit the following estimate of material furnished and labor performed.

500'	10"	cast pipe laid	¢ \$2.63.....	\$1315.00
6167	8"	wood “ “	“ .78.....	4810.26
7405	6	“ “ “	“ .62.....	4591.10
14152	4"	“ “ “	“ .49 1/2....	7005.24
9558#		special castings	“ .05 1/2....	525.69

Wood plugs				10.00
------------	--	--	--	-------

18257.29

2-10"	Valve	¢ \$35.00..	70.00	
8-8"	Valve	“ 29.00..	232.00	
9-6"	“	“ 24.00..	216.00	
15-4"	“	“ 19.00..	285.00	
31	Hydrants	“ 43.00..	1333.00	2136.00

Carried Forward..... 20393.29

Brought Forward.....		20393.29
962' 4" wood pipe not laid at .21	202.02	
375' 6" " " " " " .32	120.00	
74' 8" " " " " " .42	31.08	
Drayage on same.....	6.00	
10% on same as per contract...	35.31	394.41
<hr/>		
Pumping station contract.....	\$3465.00	
Extra labor and material.....	5.05	
Painting contract.....	30.00	
Material for same.....	23.13	3524.18
<hr/>		
Boilers completed..	3250.00	
Extending breeching and two check valves.....	21.73	3271.73
Pumping plant complete.....		2900.00
Water heater.....		166.00
Seepage well complete.....	\$575.00	
6' extra depth....	191.65	766.65
<hr/>		
Seepage Galleries Complete ..	800.00	
Extra Roofing on same.....	20.00	820.00
<hr/>		
Carried Forward....		\$32236.26
Brought forward..		\$32236.26
Reservoir Contract Complete..	\$5775.00	
Extra Columns.....	270.00	
Four vintilators....	10.00	
69 bbls cement due to changing specifications @ \$3.50.....	311.50	

Labor screening gravel, 225		
yds. @ \$1.00.....	225.00	\$6591.50
		<hr/>
		38827.96
Recd. cash as per estimate....		31460.44
		<hr/>
		7367.32
Add. for steel wheelbarrow..		3.00
		<hr/>
Less to retain for pump rods,		7370.32
stem gauge,		

Respectfully,

DES MOINES BRIDGE & IRON CO.,

By H. W. SMITH."

9. That in the records of a meeting of the said City Council of said defendant, the town of Forsyth, held on May 7th, 1908, the following appears:

"The Committee on Fire, Light and Water presented and read by the Clerk, on motion of Alderman Blum, seconded by Alderman Blair, the report of the Committee on Fire, Light and Water was adopted and approved, and the final estimate of the Des Moines Bridge & Iron Company was allowed in accordance therewith, and the report was ordered made a part of these minutes. Roll-call: Blum, Murri, Irwin and Blair, all voting Aye; motion carried."

10. That the said defendant, the City of Forsyth, acting by and through its City Council, duly accepted and considered said final estimate, account and claim as having been properly presented to the City Council, and said defendant allowed the same, and paid

thereon to plaintiffs, the sum of \$3,500.00, on the 22d day of May, 1908. That no objection was ever made to said final estimate, account and claim for monies due to plaintiffs from the defendant, under and by virtue of the terms of said contract, either to the form thereof as presented, or otherwise, but that the said defendant, by and through its council, considered and acted upon, and allowed said final estimate, account and claim as regular in form and properly presented, and paid to these plaintiffs [6] thereon the said sum of \$3,500.00; wherefore, plaintiffs allege that whatever, if any, objection there might have been to the form of said final estimate, account or claim, or to the presentation thereof, and the amount thereof, were by the action of said defendant, by and through its City Council, duly waived, and defendant is estopped and cannot be heard to make any objection in the premises.

11. That there is yet due and unpaid as aforesaid from said defendant to the said plaintiffs, the sum of \$3,870.32, and that said defendant has wrongfully and unlawfully neglected and refused to pay the same, or any part thereof, since the 1st day of June, 1908, although often requested so to do.

WHEREFORE, plaintiffs pray judgment against the defendant for the sum of \$3,870.32, together with interest thereon at the rate of 8% per annum, from the 1st day of June, 1908, and for costs of suit.

CLAYBERG & HORSKY and
GEO. W. FARR,

Attorneys for Plaintiffs. [7]

State of Montana,

County of Lewis and Clark,—ss.

John B. Clayberg, being first duly sworn, on oath deposes and says that he is the attorney for the above-named plaintiffs, E. W. Crellin, W. H. Jackson and B. N. Moss; that he has read the foregoing complaint and knows the contents thereof, and that the matters stated therein are true to affiant's best knowledge, information and belief, and that the affiant makes this affidavit because of the absence of said plaintiffs, E. W. Crellin, W. H. Jackson, and B. N. Moss, from the County of Lewis and Clark.

JOHN B. CLAYBERG.

Subscribed and sworn to before me this 14th day of April, 1911.

[Seal]

EDWARD HORSKY,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires on the 23d day of December, 1913. [8]

Exhibit "A" [to Complaint—Contract].

CONTRACT.

THIS AGREEMENT made and entered into this twenty-fifth day of May, A. D. 1907, by and between E. W. Crellin, W. H. Jackson, and B. N. Moss, co-partners doing business under the firm name and style of the "Des Moines Bridge & Iron Company," of Des Moines, Iowa, hereinafter called the contractor, and the Town of Forsyth, a municipal corporation, under the laws of the State of Montana, of

Rosebud County, Montana, hereinafter called the Town:

WITNESSETH:

That for and in consideration of the payments, covenants and agreements hereinafter set forth, to be performed by the Town, the Contractor does hereby agree to furnish all the material and labor necessary for the construction of, and to construct a water-works system in and for the said Town of Forsyth, according to the detailed plans, specifications and drawings therefor by the Iowa Engineering Company of Clinton, Iowa, engineers for said town in the planning of said water-works system, as filed in the office of the Town Clerk of said Town, and all and sundry the ordinances, resolutions, motions and notices to contractors, pertaining thereto, and the proposal of the contractor, above named, submitted on the 3rd day of May, A. D. 1907, by said contractor to said Town, all of which are hereby referred to and by this reference, are made a part of this Contract, and as [9] described in said plans and specifications, the said Contractor does hereby further agree to finish and complete said water-works system on or before the 10th day of November, A. D. 1907, in good, substantial and workmanlike manner and in all respects as required by said plans and specifications therefor a copy of which is hereto attached, hereof made a part, and marked exhibit "A"; as is a copy of the proposal of the Contractor hereinabove referred to, which is hereto attached, hereof made a part, and marked exhibit "B"; and said contractor does also hereby agree to fully indemnify and save

harmless the said town from all and every claim for damages or damages which may be presented to said Town, or which said Town may be subjected to or sustained by reason of any fault or neglect on the part of the said Contractor, their agents, servants, employees or any person or persons acting by, under or through them, the said Contractor, during the progress of said work or by or from any defect therein, resulting from the fault, neglect or failure of the said Contractor to do and perform the same as set forth and provided in the specifications thereof.

In consideration of the foregoing covenants and agreements, herein set forth, on the part of said Contractor to be done and performed, said Town does hereby agree to well and truly pay to said Contractor out of the fund hereinafter stated, and in the manner hereinafter set forth, for the construction of said water-works system, as hereinafter stated, viz: [10]

For:

One pumping station including foundation for smoke stack, complete	3465.00
Two 80-horse power boilers, including steel smoke-stack, all complete, as per boiler specifications hereto attached, hereof made a part and marked exhibit "C"	3250.00
One water heater, complete	166.00
Two collecting seepage galleries, all complete	800.00
One seepage well and intake, using 10" cast iron pipe, complete	575.00
One compound Duplex Million Gallon	

pump using Smith-Vaile Compound Duplex Pumping Engine, 12 & 18x 10x12 full brass lined and fitted as per pump specifications hereto attached, hereof made a part and marked Exhibit "D"	2900.00
One 300,000 gallon storage reservoir as per plan and specifications, complete	5775.00
500 ft. more or less 10" cast iron pipe, as per lineal foot laid	2.63
6,280 ft. more or less of 8" wood pipe, per lineal foot laid78
7,480 ft. more or less of 6" wood pipe per lineal foot laid62
11,100 ft. more or less of 4" wood pipe per lineal foot laid49½
All special fittings for pipe line per lb...	.05½
32 hydrants, more or less, 4" inlet, each..	43.00
Gate valves, 10" each.....	35.00
“ “ 8" “	29.00
“ “ 6" “	24.00
“ “ 4" “	19.00

The ditch for all the pipe above provide for to be 5½ feet deep. [11]

It is understood and agreed, however, that all of the above prices cover the complete installation of the said water works system, together with all and every the necessary fixtures, piping, connections, water valves or equipment, called for in the plans and specifications thereof or that may be necessary to operate said machinery and said system, and also the whole of said buildings, machinery and water works

system, completed in all and every respect and ready for operation, and the said town hereby specifically reserves the right to, and it is understood and agreed that said town may, at its pleasure and at all times before the completion of said Water-Works system by said Contractor, make any reasonable increase or decrease in the number of feet of pipe and the corresponding Hydrants, Valves, Boxes, etc., that may be necessary to properly equip such mains, paying therefor to said Contractor, or said Town, receiving credit therefor, at the rate herein named, it also being understood and agreed that any addition to the number of feet of water main herein set forth, required hereunder by said Town, and stated definitely, shall entitle the Contractor to a corresponding increase of time within which to install the same;

It is further understood and agreed that for extra material and labor that may be furnished to the Town by the Contractor upon order from the Council thereof and for which the Contractor may be entitled to compensation, according to the plans and specifications for said Water-works System, the Contractor, when the same is not expressly provided for in this Contract shall be paid, the actual cost thereof plus [12] ten per cent, and the said Town further agrees that all payments for work under this contract shall be made in monthly installments of eighty-five per cent of the Contract price on the completed work being any materials built in place. The balance of the contract price herein provided for, to be paid to the Contractor upon the completion and final test of said Water-works System which

test shall be to the satisfaction of the Town Council and upon the acceptance of said System by the Town Council of said town, and by its duly qualified and acting Engineer, which acceptance shall be within thirty days from and after the proper completion of the said Water-works System in all respects as provided for by this Contract, and that all such payments shall be made by warrants of said Town drawn upon its Water-works fund by order of the Town Council and Duly signed by its Mayor and Clerk.

It is further understood and agreed that the Town shall at all times provide and have available for the Contractor all necessary rights of way for buildings, pipe lines and fixtures for the installation of said Water-works System in accordance therewith, and also for any extensions thereof which may be ordered hereunder, and it is also provided that if the work herein provided for be not completed by the 30th day of November, A. D. 1907, the Contractor shall be liable for and shall pay to the Town the sum of Ten and no/100 (\$10.00) Dollars per day for each and every day thereafter until the final completion of said work, which sum is mutually agreed upon hereby as the liquidated damage said Town shall sustain in event of the non-completion [13] of said work, however, it is agreed that payment thereof shall not be enforced by said Town against the Contractor upon proof satisfactory to the Town being furnished by the Contractor showing conclusively that the delay in completion of said work was caused by circumstances over which the Contractor had no control and the Contractor hereby agrees to fur-

nish to the said Town a good and sufficient bond in the sum of Thirty Thousand and no/100 (\$30,000.00) Dollars, conditioned for the full, true and faithful performance of all and sundry the terms and conditions of this contract executed by a Surety Company, which Company must be licensed to transact such business for and within the State of Montana, which said bond shall be in form and substance satisfactory to and to be approved by the Town Council of said town, all of which shall by said Contractor be done together with the execution of this agreement from and within 30 days after May 3rd, 1907.

IN WITNESS WHEREOF the Town of Forsyth has caused this contract to be executed in the name of said Town by its duly elected, qualified and acting Mayor and to be sealed with the seal of said Town and attested by its duly appointed, qualified and acting Town Clerk, both having been first duly and lawfully authorized thereunto, and the said Contractor has caused these presents to be executed in its partnership name all being done in duplicate the [14] day and year in this certificate first above written.

THE TOWN OF FORSYTH,

By A. R. SICKLER,

Mayor.

Attest: S. H. ERWIN,

Town Clerk.

DES MOINES BRIDGE AND IRON COM-
PANY.

W. H. JACKSON.

B. N. MOSS.

E. W. CRELLIN.

The foregoing contract as altered, amended and executed on the 25th day of May, 1907, by W. H. Jackson, B. N. Moss and E. W. Crellin, copartners doing business under the firm name and style of The Des Moines Bridge & Iron Company of Des Moines, Iowa, is hereby approved and ratified by the Town of Forsyth, and the said Town of Forsyth has caused its duly elected, qualified and acting Town Clerk to seal and attest the same at Forsyth, Montana, this 7th day of June, 1907.

THE TOWN OF FORSYTH.

By D. J. MURI,
Act. Mayor.

Attest: S. H. ERWIN,
Town Clerk.

[Endorsed]: Title of Court and Cause. Complaint. Filed April 15, 1911. Geo. W. Sproule, Clerk. [15]

Thereafter, on April 15, 1911, summons was duly issued as follows, to wit: [16]

[Summons.]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City
of the Third Class of the State of Montana,
Formerly the Town of Forsyth,

Defendant.

Action brought in the said Circuit Court, and the
Complaint filed in the office of the Clerk of said
Circuit Court, in the City of Helena, County of
Lewis and Clark.

The President of the United States of America,
Greeting: to the Above-named Defendant, The
City of Forsyth, an Incorporated City of the
Third Class of the State of Montana, Formerly
the Town of Forsyth.

You are hereby summoned to answer the complaint
in this action which is filed in the office of the Clerk
of this Court, a copy of which is herewith served
upon you, and to file your answer and serve a copy
thereof upon the Plaintiff's attorney within twenty
days after the service of this summons, exclusive
of the day of service, and in case of your failure to
appear or answer, judgment will be taken against
you by default, for the relief demanded in the com-
plaint.

Witness, the Honorable EDWARD D. WHITE,
Chief Justice of the United States, this 15th day of
April, in the year of our Lord one thousand nine
hundred and eleven, and of our Independence the
135th.

[Seal]

GEO. W. SPROULE,
Clerk.

By _____,
Deputy Clerk. [17]

Robt. J. Guy, being first duly sworn, says, that I received the within summons on the 28th day of April, 1911, and personally served the same on the 29th day of April, 1911, on said defendant, the City of Forsyth, in the county of Rosebud, State of Montana, by the Mayor thereof, by delivering to, and leaving with each of said defendant named therein personally, at the City of Forsyth, County of Rosebud, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by George W. Sproule, Clerk of said court attached thereto, that affiant is not a party to, nor interested in said action.

Affiant further states that he is now, and at all the times herein mentioned has been a citizen of the United States, and of the State of Montana, and over the age of 18 years.

Dated this 29th day of April, 1911.

ROBT. J. GUY.

Subscribed and sworn to before me this 29th day of April, 1911.

[Seal] HENRY V. BEEMAN,
Notary Public for the State of Montana, Residing
at Forsyth, Montana.

My commission expires April 4, 1913.

[Endorsed]: No. 1055. U. S. Circuit Court, 9th Circuit, District of Montana. E. W. Crellin et al., vs. The City of Forsyth. Summons. Filed May 15th, 1911. Geo. W. Sproule, Clerk. By _____, Deputy Clerk. [18]

On motion of counsel for plaintiffs, permission is hereby granted that R. J. Guy may serve the within

summons, and he is hereby specially authorized by the Court to make service of process.

FRANK S. DIETRICH,
Judge.

Thereafter, on May 16, 1911, demurrer was filed herein as follows, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Copartners, Doing Business Under the
Firm Name and Style of the DES MOINES
BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City
of the Third Class of the State of Montana,
Formerly the Town of Forsyth,
Defendant.

Demurrer.

Now comes the defendant and demurs to the complaint of the plaintiff herein and for cause of demurrer alleges:

That said complaint does not state facts sufficient to constitute a cause of action.

F. V. H. COLLINS, and
GUNN & HALL,
Attorneys for Defendant.

Service accepted May 16, 1911.

Filed May 16, 1911.

GEO. W. SPROULE,
Clerk. [19]

And thereafter, on January 8, 1912, an order was entered overruling demurrer herein, as follows, to wit:

[Order Overruling Demurrer.]

*In the District Court of the United States, in and for
the District of Montana.*

No. 1055.

E. W. CRELLIN et al.

vs.

CITY OF FORSYTH.

This cause, heretofore submitted upon demurrer, came on at this time for the judgment and decision of the Court, and after due consideration, it is ordered that said demurrer be and hereby is overruled, and defendant granted until February 1, 1912, to answer.

Entered, in open court, January 8, 1912.

GEO. W. SPROULE,

Clerk. [20]

Thereafter, on Feb. 27, 1912, answer was filed herein as follows, to wit: [21]

*In the District Court of the United States, for the
District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Copartners, Doing Business Under the
Firm Name and Style of the DES MOINES
BRIDGE & IRON COMPANY.

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of
the Third Class of the State of Montana,
Formerly the Town of Forsyth,

Defendant.

Answer.

Now comes the defendant and for answer to the complaint herein:

I.

Admits the allegations of paragraphs I, II, III and IV of said complaint, except the allegation of paragraph IV that plaintiffs "duly performed all the terms, stipulations and conditions of said contract, plans, specifications and drawings, on their part to be performed, and that said water works, system and plant were fully completed by plaintiffs, and turned over to the defendant and duly accepted by the said defendant.

II.

Admits that during the progress and construction of said water plant various estimates were made of work done and material furnished which were presented to this defendant and that certain payments were made to said plaintiffs. Admits that said waterworks and system were turned over to defendant on or [22] about the 30th day of April, 1908, and that since said date this defendant has had the sole and exclusive possession and control of and has used the same for the purpose intended.

III.

Admits the allegations of paragraph VIII and IX of said complaint and alleges that the report of the committee on fire, light and water recommended that

the said final estimate be allowed as follows:

Total of final estimate as filed.....\$38,827.76.

DEDUCTIONS.

Specials..	Item 5	\$ 28.49	
Valve.....	" 7	35.00	
10% charged	" 16	35.31	
Check Valves	" 20	12.53	
Seepage well	" 26	81.19	
Cement	" 32	311.50	
Gravel	" 33	225.00	
Reservoir		100.00	
White washing..		15.00	
Rods on pumping engine....		37.25	
Freight on Rods "		4.00	
Steam Gauge.....		8.00	\$ 893.27
			<hr/>
Balance.....			\$37,934.49
Wheel Barrow... ..			3.00
			<hr/>
Total.....			\$37,937.49
Less previous payments.....			\$31,460.44
			<hr/>
Balance.....			\$ 6,477.05
Less Force Account.....			\$ 551.45
Balance.....			\$ 5,925.60
Less error in addition.....			1.00
Balance			\$ 5,924.60

That the said committee also at the same meeting of the City Council held on May 7, 1908, made a further and additional report and recommendation as follows:

“To the Honorable Mayor and Members of the Town Council, of the Town of Forsyth.

Gentlemen: [23]

We, the Committee on fire, light and water, to whom were submitted the final estimate of the Des Moines Bridge and Iron Company for water works construction, do hereby respectfully submit the following report:

The contract entered into between the Town in pursuance of Ordinance 69 contains among other things the following provision:

‘It is also agreed that if the work herein provided for be not completed by the 30th day of November, A. D. 1907, the Contractor shall be liable for and shall pay to the Town the sum of Ten and no/100—(\$10.00)—Dollars, per day, for each and every day thereafter until the full completion of said work, which said sum is mutually agreed upon hereby as the liquidated damage which said Town shall sustain in event of the non-completion of said work, however, it is agreed that the payment thereof shall not be enforced by said Town against the Contractor upon proof satisfactory to the Town being furnished by the Contractor showing conclusively that the delay in completion of said work was caused by circumstances over which the Contractor has no control.’

We beg to report that the first permission to make any use of the Water Works System occurred by action of the Council April 3d, 1908, and call attention to the fact that the plant was not then com-

plete and that computing the time from the limit of the contract, to wit: November 30th, 1907, to April 3d, 1908, 125 days' penalty had accrued and we recommend that after the allowance of the final estimate in accordance with our previous report there be withheld from the payment thereof the sum of \$1250.00 penalty or liquidated damages which the town is entitled to under the contract provision above set forth.

This recommendation is made because of the fact that the town during all of this time has been deprived of the benefit of this Water Works System which it had practically paid for and we find from examination that the actual revenue which [24] would have been derived from water rentals during this period would have amounted to the sum mentioned, to say nothing of the damage, inconvenience and expense resulting from the failure of the Contractor to complete the system.

Our investigation has impelled the conclusion in the minds of your committee that no excuse such as is contemplated by the provision of the contract quoted above can be offered by the contractor, inasmuch as the construction work was not complete until after the date mentioned and the Water Works System would not have been available for use until the construction work was complete and its completion was not delayed by circumstances over which the contractor had no control.

Although the conclusions of the committee are, as stated above, yet if the contractor elect so to do, we recommend that a day certain be fixed by the

Council on which the contractor may submit proofs to show that the delay complained of was due to circumstances over which the Contractor had no control.

Respectfully submitted."

That such report was adopted by the City Council of this defendant.

IV.

Denies that this defendant, acting by or through its City Council, or otherwise, duly or at all accepted or considered said final estimate, account and claim as having been, properly or otherwise, presented to the City Council except as hereinbefore alleged.

V.

Denies each and every allegation of said complaint not herein specifically admitted or denied. [25]

And for answer to this complaint this defendant alleges:

That the work provided for in said contract was not completed until the 3d day of April, 1908, or for a period of 125 days after the same should have been completed according to the terms and provisions of said contract and no satisfactory proof was furnished showing that the delay was caused by circumstances over which the contractor or the plaintiffs had no control, but as a matter of fact said delay was occasioned by the failure and neglect of the plaintiffs to exercise ordinary or any diligence in the furnishing of the material and the performance of the work provided for in said contract. That according to the terms and provisions of said contract this defendant is entitled to a de-

duction and allowance of \$1250.00 on account of said delay. That the said plaintiffs submitted and presented to the City Council of this defendant certain reasons for said delay which were duly considered by said City Council and held and decided to be insufficient, and said City Council decided that no satisfactory proof that such delay had been caused by circumstances over which the plaintiffs had no control had been furnished.

And for further answer to said complaint defendant alleges:

That there never has been presented to the City Council of this defendant by said plaintiffs, or either of them, or anyone for them, or either of them, any account or demand against this defendant for the amount of said alleged final estimate, or any part thereof, or for the amounts sought to be recovered in this action, or any part thereof, accompanied by an affidavit of the plaintiffs, or either of them, or by any agent for them, or either of them, or any affidavit stating [26] the same to be a true and correct account against this defendant for the full amount sought to be recovered in this action, or any amount, or containing any statement whatever, but on the contrary the only account or demand or claim for the amount of said alleged final estimate sought to be recovered in this action ever presented to the City Council is the itemized statement in writing quoted and made a part of paragraph VIII of said complaint, which said itemized statement was not accompanied by any affidavit.

And for further answer to said complaint this defendant alleges:

That the cause of action stated in said complaint is barred by the provisions of section 3288 of the Revised Codes of Montana.

WHEREFORE, defendant having fully answered, prays to be hence dismissed with its just costs.

And for further answer to said complaint and by way of counterclaim this defendant alleges:

1. That the plaintiffs are and were at all the times herein mentioned copartners doing business under the firm name and style of Des Moines Bridge and Iron Company.

2. That this defendant is a municipal corporation incorporated and existing under and by virtue of the laws of the state of Montana.

3. That heretofore and on or about the 25th day of April, 1908, there was paid to said plaintiffs by the city treasurer of this defendant out of the funds and money of this defendant in the possession of said city treasurer the sum of \$2831.01.

4. That no account or demand against this defendant for [27] the said sum of \$2831.01 so paid, or any part thereof accompanied by an affidavit of the plaintiffs, or either of them, or of any agent of the plaintiffs, or either of them, or by any affidavit, was ever presented to the City Council of this defendant.

5. That the amount so paid to said plaintiffs as aforesaid was paid and received on account of material claimed to have been furnished and labor claimed to have been performed by said plaintiffs in carrying out and complying with said contract mentioned in the complaint in this action, a copy

of which is made a part of said complaint as Exhibit "A."

6. That no part of the said \$2831.01 so paid to and received by said plaintiffs has ever been repaid and the said plaintiffs are now indebted to this defendant for said sum.

WHEREFORE, defendant demands judgment against the plaintiffs for the sum of \$2831.01, with interest thereon at the rate of eight per cent per annum from the 25th day of April, 1908.

And for further answer to said complaint and by way of counterclaim this defendant alleges:

1. That the plaintiffs are and were at all the times herein mentioned copartners doing business under the firm name and style of Des Moines Bridge and Iron Company.

2. That this defendant is a municipal corporation incorporated and existing under and by virtue of the laws of the State of Montana.

3. That heretofore and on or about the 22d day of May, 1908, there was paid to said plaintiffs by the city treasurer of this defendant out of the funds and money of this defendant in the possession of said city treasurer the sum of \$3500.00. [28]

4. That no account or demand against this defendant for the said sum of \$3500.00 so paid, or any part thereof, accompanied by an affidavit of the plaintiffs, or either of them, or of any agent of the plaintiffs, or either of them, or by any affidavit, was ever presented to the City Council of this defendant.

5. That the amount so paid to said plaintiffs as aforesaid was paid and received on account of ma-

terial claimed to have been furnished and labor claimed to have been performed by said plaintiffs in carrying out and complying with said contract mentioned in the complaint in this action, a copy of which is made a part of said complaint as Exhibit "A," and is the \$3500.00 referred to and mentioned in paragraph X of the complaint as having been paid to said plaintiffs on the 22d day of May, 1908.

6. That no part of the said \$3500.00 so paid to and received by said plaintiffs has ever been repaid and the said plaintiffs are now indebted to this defendant for said sum.

WHEREFORE, defendant demands judgment against the plaintiffs for the sum of \$3500.00, with interest thereon at the rate of eight per cent per annum from the 22d day of May, 1908.

F. V. H. COLLINS,
GUNN, RASCH & HALL,
Attorneys for Defendant. [29]

State of Montana,
County of Lewis & Clark,—ss.

M. S. Gunn, being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the matters stated in said answer are true to the best of his knowledge, information and belief; that the reason he makes this verification is because there is no officer of the said defendant now in the county of Lewis and Clark wherein affiant resides.

M. S. GUNN.

Subscribed and sworn to before me this 27 day of Feby., 1912.

W. W. PATTERSON,
Notary Public for the State of Montana, Residing at
Helena, Montana.

My Commission Expires,

Service of the within Answer admitted and receipt of copy thereof acknowledged this —— day of February, A. D. 1912.

S.

_____,
Attorney for Pltffs.

Filed Feb. 27, 1912. Geo. W. Sproule, Clerk.
[30]

Thereafter, on March 30, 1912, replication was filed herein as follows, to wit: [31]

*In the District Court of the United States for the
District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Copartners, Doing Business Under the
Firm Name and Style of the DES MOINES
BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City
of the Third Class of the State of Montana,
Formerly the Town of Forsyth,
Defendant.

Replication.

Now come the above-named plaintiffs, and for reply to the answer herein:

I.

1. Concerning the allegations of paragraph III of said answer in reference to the alleged “further and additional report” of the Committee on Fire, Light and Water, and the alleged adoption thereof by the City Council of defendant, these plaintiffs have not any knowledge or information thereof sufficient to form a belief, and therefore deny the same.

2. Deny generally and specifically each and every allegation in the further and affirmative answer to the said complaint contained on pages 5 and 6 of said answer.

II.

And in reply to the first counterclaim of said defendants:

1. Admit the allegations contained in paragraphs I, II and III thereof; and also admit that no part of the said sum [32] of \$2,831.01 has ever been repaid by plaintiffs to said defendant.

2. Deny generally and specifically each and every allegation in said first alleged counterclaim not hereinbefore specifically admitted or denied.

III.

And in reply to the second counterclaim of said defendant:

1. Admit the allegations contained in paragraphs I, II and III of said second counterclaim; and also admit that no part of said sum of \$3,500.00 has been repaid by these plaintiffs to defendant.

2. Deny generally and specifically each and every allegation in said second counterclaim not hereinbefore specifically admitted or denied.

WHEREFORE, having fully replied the plaintiffs pray for the relief demanded in their complaint herein.

J. B. CLAYBERG,
EDWARD HORSKY,
Attorneys for Plaintiffs. [33]

State of Montana,
County of Lewis and Clark,—ss.

Edward Horsky, being first duly sworn, says: That he is one of the attorneys for the plaintiffs in the above-entitled action; that he has read the foregoing replication, and knows the contents thereof, and that the matters stated in said replication are true to his best knowledge, information and belief; that the reason he makes this verification is because of the absence of the said plaintiffs and each of them from the county of Lewis and Clark, wherein affiant resides.

EDWARD HORSKY.

Subscribed and sworn to before me this 30th day of March, A. D. 1912.

[Seal] E. M. HALL,
Notary Public for the State of Montana, Residing at
Helena, Montana.

My commission expires the 27th day of July, 1913.

Service accepted Mar. 30, 1912.

Filed Mar. 30, 1912. Geo. W. Sproule, Clerk.
[34]

Thereafter, on January 22, 1913, amendment to complaint was filed herein as follows, to wit: [35]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,
Defendant.

Amendment to Complaint.

Now come the above-named plaintiffs, and by leave of Court first had and obtained, make and file this their amendment to the complaint herein, and plaintiffs complain and allege:

10½. That on or about the — day of October, 1907, and on or about the — day of November, 1907, and on or about the — day of December, 1907, and on or about the — day of January, 1908, and on or about the — day of March, 1908, and on or about the — day of May, 1908, the said plaintiffs presented to the Town Council of said Town of Forsyth, a claim or demand duly itemized, being monthly estimates, for the amounts of ten thousand four hundred and twenty dollars and eighty-three cents (\$10,420.83), and eleven thousand eight hundred and forty-eight dollars and fifteen cents (\$11,848.15),

and four thousand six hundred and ninety-four dollars and ten cents (\$4,694.10), and two thousand five hundred and sixty dollars and forty-six cents (\$2,560.46), and two thousand six hundred and sixty-five dollars and one cent (\$2,665.01), and seven thousand three hundred and [36] seventy dollars and thirty-two cents (\$7,370.32), respectively, for work, labor and materials pursuant to said contract for the preceding month, accompanied by an affidavit stating the same to be a true and correct account against said town for the full amount for which the same was presented, and that said claim and demand accrued as set forth; and that all of the said described claims, demands and estimates, with the exception of the last one thereof, were paid, and on which said last mentioned final claim, demand or estimate, there was paid, as hereinbefore alleged, the said sum of three thousand five hundred dollars (\$3,500.00).

EDWARD HORSKY,

Attorney for Plaintiffs. [37]

State of Montana,

County of Lewis and Clark,—ss.

Edward Horsky, being first duly sworn, on oath deposes and says that he is the attorney for the above-named plaintiffs, E. W. Crellin, W. H. Jackson, and B. N. Moss; that he has read the foregoing amendment to complaint, and knows the contents thereof, and that the matters stated therein are true to affiant's best knowledge, information and belief, and that affiant makes this affidavit because of the absence of said plaintiffs, E. W. Crellin, W. H. Jack-

son, and B. N. Moss from the County of Lewis and Clark, wherein affiant resides.

EDWARD HORSKY.

Subscribed and sworn to before me this 22d day of January, 1913.

GEO. W. SPROULE,
Clerk.

Filed Jan. 22, 1913. Geo. W. Sproule, Clerk.
[38]

Thereafter, on January 23, 1913, amended replication was filed herein as follows, to wit: [39]

*In the District Court of the United States for the
District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Copartners Doing Business Under the
Firm Name and Style of the DES MOINES
BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of
the Third Class of the State of Montana,
Formerly the Town of Forsyth,
Defendant.

Amended Replication.

Now come the above-named plaintiffs, and by leave of Court first had and obtained, for their amended replication to the answer herein:

I.

1. Concerning the allegations of paragraph III of said answer, admit that the report of the Committee

on Fire, Light and Water recommended, among other things, the allowance of certain items, in part, and also certain deductions, but in that behalf allege that only a portion of said report is set forth in said answer, and that certain other items of plaintiffs' account and estimate then before the Council were in said report allowed as therein more fully set forth.

2. And with reference to the allegations of said answer on page 5 thereof, lines 1 to 20 thereof: Plaintiffs admit that the work provided for in said contract was not completed until the 3d day of April, 1908, but deny that no satisfactory proof was furnished by them that such delay was caused by circumstances over which the plaintiffs had no control, and also deny that they failed to exercise ordinary or any diligence in the performance of said work; and in that behalf allege that [40] said non-completion was occasioned by, and due to, certain acts of defendant, and its omission, failure, and neglect to perform certain acts on its part and by it to be done and performed, to wit: (a) that the plans and specifications were uncertain, indefinite, and ambiguous as to the locus of the collecting seepage, or filter, galleries, in that it could not be ascertained therefrom whether the same were to be underneath the water of the river,—or outside the water's edge but within bank or shore line and underneath the riverbed, and therefrom, on or about the 4th day of September, 1907, plaintiffs requested defendant to definitely locate said galleries, but the Town Council of defendant and its representatives were yet undecided in the matter and taking the matter under considera-

tion did not decide as between said points of location until on or about December 10, 1907, when and whereupon at a regular meeting of the Town Council as set forth in its official council minutes, action was finally taken in reference thereto, said minutes being as follows:

“It appearing to the satisfaction of the town council that the plans and specifications for the location of seepage galleries for the water works for the town of Forsyth are somewhat inadequate and indefinite, wherefore it was moved by Alderman Irwin, seconded by Blum, that the town council do now provide for the location of said seepage galleries 25' distance from the center of the intake well, providing the contractors, the D. M. B. & I. Co. agree to locate the said seepage galleries as mentioned above without extra expense to the town of Forsyth, and Alderman Muri be hereby empowered and authorized in connection with the contractor to stake out and locate said seepage galleries as herein provided. Roll call:

“Alderman Irwin, yea;

“ Blum, yea; [41]

Alderman Muri, yea;

and motion carried. Motion to adjourn carried.”

And promptly thereupon plaintiffs agreed thereto and did without extra expense to defendant locate said galleries; and plaintiffs together with Alderman Muri did stake out and locate said seepage galleries pursuant to said action of the Council, and promptly thereafter plaintiffs prosecuted the work on said galleries with all practicable diligence and particularly considering causes over which they had no control,

and which had not existed during the months of September, October, and November, 1907, to wit: freezing weather, resultant ice gorges, and damming back of river waters therefrom and overflowing of the galleries and freezing conditions unique to the Yellowstone River; that during the fall season and prior to November 30, 1907, the said galleries could and would have been completed but for said acts of defendant, or at any other season except the freezing or winter season, could and would have been completed in about 60 days.

(b) And furthermore, that on or about the 25th day of September, 1907, work on the pump-house was delayed at defendant's request by the contemplated changes in the plans for said pump-house, as well as a different method or system of filtration, and in reference to the substitution whereof the Town Council was undecided and so notified plaintiffs, and thereupon submitted to plaintiffs a detailed drawing or plan for the same, prepared by its Consulting Engineer, the Iowa Engineering Works, and requested plaintiffs to and they did furnish defendant a written proposal for such changes, and thereafter on or about the 25th day of October, 1907, defendant finally decided not to make such changes, and that it would proceed according to its original plan and so notified plaintiffs, who thereupon promptly resumed work on said pump-house according to the original [42] plan and prosecuted its work with all practicable diligence.

(c) Admit that these plaintiffs submitted and presented to the Town Council of defendant certain

reasons for said delay, and that the same were held and deemed insufficient by said Council and by it decided that no satisfactory proof of such delay had been caused by circumstances over which plaintiffs had no control, but deny that said delay was occasioned by their failure or neglect to exercise ordinary or any diligence in the furnishing of material, and in that behalf, allege that plaintiffs used all practicable diligence to assemble the materials for said contract, and the same were assembled at Forsyth at the earliest practicable date after the date of said contract (May 25, 1907), taking into consideration the geographical location of the town, the distance from available and practicable supply points, the nature and character of the proposed undertaking and all things considered; and that by force of circumstances over which plaintiffs had no control, to wit, a strike long-continuing in the only factory manufacturing the Smith-Vaile pump, patented, and one of special design according to said contract (as distinguished from a pump kept in stock) plaintiffs could not procure such pump (though ordered for August 15, 1907) at any time prior to February 15, 1908, when the same was promptly installed and in successful operation on the — day of February, 1907; and that repeatedly and from time to time plaintiffs in good faith offered and agreed, irrespective of cost, to furnish, prior to said November 30, 1907, a Worthington or Dean pump, or any other pump equal to said Smith-Vaile pump, pursuant to the pump specifications of said contract, but that defendant declined such offer, and notwithstanding such strike, so be-

yond its control, arbitrarily and capriciously refused to consider [43] the sworn proof of such fact made by the Smith-Vaile pump factory and submitted by plaintiffs to defendant's Town Council; and plaintiffs further aver that the clause in said contract requiring proof "conclusive" to the Town Council is illegal, null and void, in that it is contrary to public policy and an attempt to oust the courts of their jurisdiction in the premises.

(d) Deny that according to the terms or provisions of said contract, or otherwise, or at all, defendant was or is entitled to a deduction or allowance of \$1,250.00, or any other sum, or at all, for or on account of such delay or otherwise or at all.

(e) And plaintiffs further allege that Section 2223 of the Civil Code of Montana, enacted by the Legislative Assembly of Montana in 1895, and ever since in full force and effect since July 1, 1895, and never repealed, and which was re-enacted by an Act of the Tenth Legislative Assembly of said State, approved March 13, 1907, as Section 5047 of the Revised Codes, provides as follows: "Time is never considered as of the essence of a contract, unless by its terms expressly so provided."

(f) And by reason of the said foregoing facts, hereinbefore affirmatively alleged, plaintiffs were prevented from completing said work until said 3d day of April, 1908, and by reason whereof and defendant's subsequent conduct and actions in the premises prior to April 3, 1908, said defendant has no right, or if any it had, it thereby waived the same, as well as its power and right to claim the same,

and it should be and was and is estopped from claiming or to claim or assert the same, or for the non-performance of the work or furnishing of material under said contract by said 30th day of November, 1907, or any other dates prior to the 3d day of April, 1908.

(g) Deny generally and specifically each and every allegation [44] in said portion of said answer not hereinbefore specifically admitted or denied.

II.

The reply to the "further answer," set forth on page 5 commencing on line 21, and ending on page 6, line 9, with reference to the presentation of an itemized, verified account or demand, plaintiffs deny generally and specifically each and every allegation therein contained.

III.

Deny that the cause of action stated in said complaint is barred by the provisions of Section 3288 of the Revised Codes of Montana.

IV.

And in reply to the first counterclaim of said defendant:

1. Admit the allegations contained in paragraphs I, II, and III thereof; and also admit that no part of the said sum of \$2,831.01 has ever been repaid by plaintiffs to said defendant.

2. Deny generally and specifically each and every allegation in said first alleged counterclaim not hereinbefore specifically admitted or denied.

V.

And in reply to the second counterclaim of said defendant:

1. Admit the allegations contained in paragraphs I, II, and III of said second counterclaim; and also admit that no part of said sum of \$3,500.00 has been repaid by these plaintiffs to defendant.

2. Deny generally and specifically each and every allegation in said second counterclaim not hereinbefore specifically admitted or denied.

WHEREFORE, having fully replied the plaintiffs pray for [45] the relief demanded in their complaint herein.

EDWARD HORSKY,
Attorney for Plaintiffs.

State of Montana,
County of Lewis and Clark,—ss.

Edward Horsky, being first duly sworn, says: That he is one of the attorneys for the plaintiffs in the above-entitled action; that he has read the foregoing amended replication, and knows the contents thereof, and that the matters stated in said amended replication are true to his best knowledge, information and belief; that the reason he makes this verification is because of the absence of the said plaintiffs and each of them from the said County of Lewis and Clark, wherein affiant resides.

EDWARD HORSKY.

Subscribed and sworn to before me this 23d day of January, 1913.

GEO. W. SPROULE,
Clerk.

Filed Jan. 23, 1913. Geo. W. Sproule, Clerk. [46]

Thereafter, on January 24, 1913, further answer and counterclaim of defendant was filed herein as follows, to wit: [47]

*In the District Court of the United States for the
District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Copartners, Doing Business Under the
Firm Name and Style of the DES MOINES
BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of
the Third Class of the State of Montana, For-
merly the Town of Forsyth,
Defendant.

Further Answer and Counterclaim.

And for further answer to said plaintiff's complaint, and by way of counterclaim, this defendant, by leave of Court first had and obtained, permitting an amendment to said defendant's answer, alleges:

1. That the said plaintiffs are, and were at all the times herein mentioned, copartners, doing business under the firm name and style of Des Moines Bridge & Iron Company.

2. That under said contract with said plaintiffs, said plaintiffs were required to construct and build said waterworks, but that on or about the 28th day of February, 1908, and before the work on said waterworks plant or system provided for in said contract, had been completed, said plaintiffs stopped work on said waterworks and system, and failed to

resume work on said system after notice from said defendant to said plaintiffs requiring them to do so; that on account of the failure on the part of said plaintiffs to complete said waterworks and system, and their failure to resume work thereon when notified to do so as aforesaid, the said city [48] was obliged to, and did, perform work and labor for the completion of said waterworks and system between the 15th day of March, 1908, and the 3d day of April, 1908, and paid and expended for work and labor and services so performed by it in the construction of said waterworks and system, the sum and amount of \$551.45, no part or portion of which said amount has ever been repaid by said plaintiffs to said defendant.

WHEREFORE defendant prays judgment against said plaintiffs as an offset to said plaintiff's demand, if any it has, to the amount of said sum of \$551.45.

F. V. H. COLLINS and
GUNN, RASCH & HALL,
Attorneys for Defendant.

State of Montana,
County of Lewis and Clark,—ss.

D. J. Muri, being first duly sworn, deposes and says: That he is an officer of said defendant corporation, to wit, the mayor of said City of Forsyth, and makes this verification on behalf of said corporation; that he has read the foregoing amendment to the answer of said defendant, and knows the contents thereof, and that the same is true to the best of affiant's knowledge, information and belief.

D. J. MURI.

Subscribed and sworn to before me this 24th day of January, 1913.

[Seal]

W. W. PATTERSON,

Notary Public for the State of Montana, Residing at
Helena, Montana.

My commission expires May 6th, 1914.

Filed Jan. 24, 1913. Geo. W. Sproule, Clerk. [49]

Thereafter, on January 27, 1913, judgment was duly entered herein as follows, to wit: [50]

*In the District Court of the United States for the
District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Copartners, Doing Business Under the
Firm Name and Style of the DES MOINES
BRIDGE & IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of
the Third Class of the State of Montana, For-
merly the Town of Forsyth,

Defendant.

Judgment.

This cause came on regularly for trial on the 22d day of January, 1913, Edward Horsky appearing as counsel for plaintiff, and Messrs. F. V. H. Collins and Gunn, Rasch & Hall for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the Court sitting without a jury, whereupon witnesses were examined on the part of the plaintiffs

and on the part of the defendant, and the evidence being closed, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon, the Court finds in favor of the plaintiffs in the sum of two thousand three hundred and thirty-two and eighty-nine one-hundredths dollars (\$2,332.89), and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that the said plaintiffs, E. W. Crellin, W. H. Jackson, and B. N. Moss, copartners, doing business under the firm name and style of the Des Moines Bridge & Iron Company, do have and recover of and from the said defendant, The City of Forsyth, an incorporated city of the third class of the State of Montana, formerly the town of Forsyth, the sum of two thousand three hundred and thirty-two and eighty-nine one-hundredths dollars (\$2,332.89), together with interest thereon at the rate of eight (8) per cent [51] per annum, from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$378.40 dollars.

Judgment entered January 27, 1913.

GEO. W. SPROULE,
Clerk.

Attest a true copy.

GEO. W. SPROULE,
Clerk.

United States of America,
District of Montana,—ss.

I, George W. Sproule, Clerk of the United States

District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 27th day of January, A. D. 1913.

GEORGE W. SPROULE,
Clerk.

By _____,
Deputy Clerk.

Filed Jan. 27, 1913. Geo. W. Sproule, Clerk. [52]

That on January 8, 1912, Memo Order Overruling Demurrer was made and filed herein as follows, to wit:

No. 1055.

E. W. CRELLIN et al.,

Plaintiffs,

vs.

THE CITY OF FORSYTH,

Defendant.

Memorandum Order [Overruling Demurrer, etc.].

The presentation of the final estimate to the council fulfilled the essential requirements of section 3283 of the Revised Codes. The object of requiring presentation is evidently to notify the council of the specific account or demand so that it may have opportunity to consider and investigate, if it so desires, before taking action.

This rule pertains to the demand or account itself, that is to say, to the very substantial thing, rather

than to the form of the account or demand. Presentation therefore must be had as a condition precedent to the maintenance of an action.

But the provision which calls for the accompaniment of an affidavit relates to the manner in which the account or claim presented shall be supported. The verification required does not, however, affect the claim or account itself, nor is it a part thereof, for it has only to do with the writing which shall accompany the account or demand presented.

The fact then that there can be no waiver of the requirement for presentation does not lead to the conclusion that irregularities in the form of the claim presented or in the papers which accompany the claim presented, but which do not constitute the claim or [53] demand, cannot be waived.

It is plain that the reasons which control the necessity for the presentation of the claim do not apply with great cogency to the formal statement in support of the claim.

Presentation of the claim is the important thing, and while the formal verification ought to be had, it is not indispensable to the claim itself or to the valid presentation thereof; hence omission of such affidavit of verification is an irregularity which can be waived.

Believing that this construction of the statute is based upon a just and well founded distinction, it follows that the acts done by the city council as pleaded in the present instance constituted a waiver of verification.

The demurrer is overruled, and the defendant must answer by February 1st.

Dated January 8th, 1912.

Filed Jan. 8, 1912. [54]

Thereafter, on April 19, 1913, Bill of Exceptions was settled and allowed and filed herein, being as follows, to wit: [55]

*In the District Court of the United States, in and for
the District of Montana.*

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Copartners Doing Business Under the
Firm Name and Style of the DES MOINES
BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City
of the Third Class of the State of Montana,
Formerly the Town of Forsyth,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above cause came on regularly for trial in said above-entitled court on the 22 day of January, 1913, before the Honorable George M. Bourquin, the Judge of said court, without a jury, a trial by jury having been expressly waived by the parties to said action, Mr. Edward Horsky appearing as counsel for the plaintiffs, and Messrs. F. V. H. Collins and Gunn, Rasch & Hall, appearing as counsel for the defendant.

And thereupon the following proceedings were had:

The defendant objected to the introduction of any evidence on the part of the plaintiffs in support of the allegations of the complaint, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, for the reason that it was not therein alleged that the said final estimate and demand, copy of which is attached to plaintiff's complaint, marked Exhibit "A," was accompanied by an affidavit by said plaintiffs or their agent, stating the same to be a true and correct account against the said defendant, for the full [56] amount for which the same was presented, as required by the provisions of Sections 3283 and 3288 of the Revised Codes of the State of Montana.

Whereupon counsel for plaintiffs asked leave to amend their complaint by adding thereto the following additional paragraph:

"10½. That on or about the — day of October, 1907, and on or about the — day of November, 1907, and on or about the — day of December, 1907, and on or about the — day of January, 1908, and on or about the — day of March, 1908, and on or about the — day of May, 1908, the said plaintiffs presented to the Town Council of said Town of Forsyth, a claim or demand duly itemized, being monthly estimates, for the amounts of ten thousand four hundred and twenty dollars and eighty-three cents (\$10,420.83), and eleven thousand eight hundred and forty-eight dollars and fifteen cents

(\$11,848.15), and four thousand six hundred and ninety-four dollars and ten cents (\$4,694.10) and two thousand five hundred and sixty dollars and forty-six cents (\$2,560.46), and two thousand six hundred and sixty-five dollars and one cent (\$2,665.01), and seven thousand three hundred and seventy dollars and thirty-two cents (\$7,370.32), respectively, for work, labor and materials pursuant to said contract for the preceding month, accompanied by an affidavit stating the same to be a true and correct account against said town for the full amount for which the same was presented, and that said claim and demand accrued as set forth; and that all of the said described claims, demands and estimates, with the exception of the last one thereof, were paid, and on which said [57] last mentioned final claim, demand or estimate, there was paid, as hereinbefore alleged, the said sum of three thousand five hundred dollars (\$3,500.00).”

Which was granted by the Court.

And thereupon the following testimony, and none other was introduced, with reference to the allegations contained in said additional paragraphs 10½, and upon the issue whether a demand or account against said defendant, accompanied by an affidavit, as required by said Sections 3283 and 3288 of the Revised Codes of Montana, had been presented for allowance to said defendant, City of Forsyth:

Testimony.**[Testimony of George W. Farr, for Plaintiff.]**

GEORGE W. FARR, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. HORSKY.)

My name is George W. Farr; am a lawyer, and am practicing at Miles City, and have practiced law between sixteen and seventeen years. I was consulted as an attorney by the Des Moines Bridge & Iron Company, the plaintiff in this case, in reference to the controversy with the town of Forsyth, concerning the installation of the waterworks system there. That was in 1908. With reference to the final claim, or final estimate, we presented a statement, which Mr. Smith swore to, on behalf of the Des Moines Bridge & Iron Company, and it was afterwards filed with the city council of Forsyth. It was a detailed statement and itemized. As to the form of affidavit, I could not give you the words of the affidavit at all. It was an affidavit sworn to by Mr. Smith, that the items of the account were true and correct and wholly unpaid; now, whether those were the exact words used, I do not know. The itemized statement was based on the statute requiring presentation of claims, itemized, verified claims, and demands against towns and cities. As to who was present when I went before the town council at Forsyth, [58] Mr. Smith was present, and it was in May or June, 1908, that I and Mr. Smith prepared and presented this sworn, itemized claim to the City Council. I took up this matter personally

(Testimony of George W. Farr.)

in my capacity as an attorney when I was at Forsyth, before the town council. As to the result of our efforts before the council on behalf of the company with reference to the presentation of the claim and demand, it was made pretty clear that nothing could be accomplished with the city by any negotiations for payment. The only reasons assigned for nonpayment were delay and seepage galleries.

Cross-examination.

(By Mr. RASCH.)

I could not tell the exact day now, when, in 1908, I was first retained by the plaintiffs in this case to act for them as their attorney. I had not been called upon to give advice or render any service for plaintiffs before any differences had arisen between the plaintiffs and the City of Forsyth, with reference to this final estimate. I would say it was along in April or May, probably in April, 1908. It was after those differences had come up that Mr. Smith either wrote me or came down to see me. Mr. Smith, I recall, came down to see me, and the question came up as to the character of the claim he presented, and I advised him that I thought it was necessary for him to present an additional claim. It appeared that the claim that was originally presented was not sworn to, and I told him it would be necessary to file a sworn claim, and pursuant to that he either sent to me or brought down to me copies of the estimates or original claims, or whatever they were, he had originally filed. What I refer to is that. I learned from him, or by communication with the city clerk, or possibly from an

(Testimony of George W. Farr.)

examination of the records myself, that the claim or estimate he had filed had not been properly sworn to, as I recall it now, not sworn to at all, and I told him it was necessary for him to file a properly sworn claim, and advised him to make that claim covering everything. I undoubtedly [59] made a copy of the final estimate or account which I made and presented to the council, but I have no independent recollection of it. I must have done it. As to what became of it, I think I gave that to Mr. Smith. I think we presented this verified account to the City Council in person. We had a meeting with the City Council, Mr. Smith and I did, and I think it was at that time that the account was presented. But it might be that the statement was presented at that time. I do not know whether the verified statement and the communication setting forth reasons for delay were filed at the same time. It was filed about the same time, but whether exactly the same time, I could not say. I was personally present in Forsyth, and my recollection is that I personally presented and filed the claim to the City Council. I know that I was personally present at the meeting of the City Council, and I think it was at that time that the claim was presented. Understand me, I am not sure—I mean at that date; whether it was at the night of the meeting or whether it was possibly made during the day at the city clerk's office, I would not say. As to whether I have any positive recollection whether it was presented at all to anybody, I know it was brought up there and filed or sent up and filed. I would not say whether it was

(Testimony of George W. Farr.)

filed with the city clerk before the meeting of the Council, or at the time that the Council was in session. If it was filed with the city clerk, it would be filed in his office, not necessarily with him. I have no distinct recollection of going to Mr. Collins' office and filing the claim; I have a very distinct recollection of being at his office. I have a distinct recollection of being before the Council, and think that the claim was filed at that time. I would not swear to it. As to the members of the Council present at that time, I am positive as to three of them, Mr. Muri and Mr. Blum and Mr. Erwin; I am not positive as to any one else. I have no recollection whether the city clerk or city attorney, Mr. Collins was there. In regard to this matter, I think I was before the Council only once, and took up everything with the Council. As to the time when I was before the Council, it was in the latter part of May or the first of June. I could not give you the date [60] now. As to what the members of the Council said when I presented the account, when we had this meeting that I referred to, they turned it down, that is about the only way I could express the general results of the meeting. There was a great deal said along the whole line, but what was said in particular upon any particular subject, I would not state positively, except what I stated upon direct examination; that is, they made the claim for delay. That seemed to be their main contention. I have no recollection that there was any specific statement made with reference to the verified account that I filed there, not as to the account itself any more

(Testimony of George W. Farr.)

than a general statement of the balance due, etc. After I had been unsuccessful in getting the Council to accede to my demand, I filed a mechanic's lien, but I didn't know at that time that a mechanic's lien upon property of a municipal corporation was no good, under the decisions of the Supreme Court of Montana.

I filed on the law side of this court a complaint for the foreclosure of that mechanic's and materialman's lien, and the papers which you show me is the judgment-roll in that case, and the action was commenced, according to the filing mark, on August 22, 1908. The mechanic's lien was prepared by me and sworn to by me as the attorney for the plaintiffs some time in July, 1908. In the complaint I simply set out the account and the lien, and prosecuted the action upon the contract between the parties, and what was done under the contract, and the balance upon the contract, and some extra items, as I now recall it. Whether, as a matter of fact, it was on an open, unsettled account between the City and my clients, it was an unpaid transaction, yes, sir.

Q. Why was it, if you had taken the pains to familiarize yourself with the law requiring the *presentation* the verified claims, as required by the statute, that you prepared a mechanic's lien and brought an action to foreclose the mechanic's lien? [61]

A. I do not know. I undoubtedly knew at that time that this account had been presented and verified by the parties, under my directions and advice. Subsequently I filed an amended and supplemental

(Testimony of George W. Farr.)

bill in equity. As to whether in that supplemental bill in equity reference was made at all to the fact that an account verified by the statutes had been presented to the council, I do not know.

Redirect Examination.

(By Mr. HORSKY.)

Q. So that there may be no uncertainty, Mr. Farr, will you please explain to the Court whether it was either before the Town Council or before the Clerk's office that this sworn itemized claim was actually presented?

A. It must have been, Mr. Horsky. I have no independent recollection of the precise act of filing. I distinctly remember of drafting it. I distinctly remember of our being before the Town Council of Forsyth, and associating those different things together; it must have been at that time, but I do not want to state positively that it was. As to having an opportunity since I left the stand this morning to look up any trip in June which I took back east by which I could fix the day in which I was in Forsyth, sometime during the week of June 2d I left Miles City; that is, the same week in which June 2d would come. I left Miles City for the east, and was gone to the 22d of June. I would not give the exact dates, but I could not have returned but a few days before the 22d anyway.

Recross-examination.

(By Mr. RASCH.)

Whether I appeared before the Council prior to my departure for the east or after, if I appeared

(Testimony of George W. Farr.)

after, it was [62] after June 22d, it was either before June 2d or after June 22d. I am very positive it must have been before June 2d.

[Testimony of Henry W. Smith, for Plaintiffs.]

HENRY W. SMITH, a witness called and sworn on behalf of the plaintiffs, testified that he was in charge of the construction work for the plaintiffs, and had been in their employ for seventeen years. With reference to the presentation of the alleged verified claim, he testified as follows:

Direct Examination.

(By Mr. HORSKY.)

With reference to the matter of the presenting of a claim or final estimate to the Town Council of Forsyth, I have seen the one written in long-hand here and filed. In addition to this final estimate written out in long-hand by me, there was another claim or demand submitted and presented by me to the City Council. I have not a copy of that claim. I heard Mr. Farr state that he thought that he had given it to me; if he ever gave it to me, it was lost somewhere, we didn't find it. We made search for it; very diligent search. As to what I did in having prepared by Attorney Farr what might be termed a second or revised supplemental final sworn claim, after some unsuccessful demands to get a settlement with the Town of Forsyth, I took the matter up with Mr. Farr, and after some little time we agreed that he was to look after our interests there in that case. I don't remember how long that was, but some little time, and when we got down to business of looking after

(Testimony of Henry W. Smith.)

the case Mr. Farr asked me if I had filed an affidavit with my final report. I admitted I had not, and he said that it was necessary to do it. It was prepared by him and sworn to by me.

I was present at the Town Council meeting in May with [63] Mr. Farr; and as to whether I recall whether it was at the town clerk's office or before the Council meeting that this verified claim or demand was presented, my recollection is that we left it at the clerk's office, but I am not positive. It may have been before the Town Council, but I am not positive. I am positive as to the fact that it was one place or the other. There is no question of that feature of it in my mind. I know Mr. Collins. He was the town clerk at that time, I believe, or acted in that capacity, and I think he was in charge of his office. I am not positive whether he was there at the time, but I believe he was.

Cross-examination.

(My Mr. RASCH.)

The final estimate attached to plaintiffs' complaint is the one that I presented first. That is the only one I presented. As to whether I took the matter up with Mr. Farr personally, going to Miles City, or by correspondence, I believe I called him up once by phone and wrote him once. I was present when this verified account was made up subsequently. It was made up in Mr. Farr's office in Miles City, at the same time as the statement accounting for the delays. I have with me a true and exact copy of the final estimate; and after the papers were prepared I returned

(Testimony of Henry W. Smith.)

to Forsyth. I think the verified account and statement was left with Mr. Farr until it was finally filed with the City. I do not recollect definitely whether the two papers were filed at the same time, that is, the verified account and the statement containing the excuses for the delay. It was filed somewhere along about the second day of June or the latter part of May, and I think both Mr. Farr and myself attended to the filing of this verified account. As to whether I have any recollection as to its being filed when the City Council was in session, with the City Council or with the City Clerk, my memory is as near as I can tell, it was filed with the City Clerk, on the same day, but we met with the City Council in the evening. Mr. Farr was with me at the time before the City Council when the matter was taken up. I have no particular [64] recollection whether the account was there before the Council when the matter was discussed. This particular paper, the verified supplemental account, must have been before the Council at the time Mr. Farr and I discussed with the Council the basis of making a settlement.

Redirect Examination.

(By Mr. HORSKY.)

The City Council made no objection to the form of the claim that I know of, and I never heard of any prior to this suit.

[Testimony of E. H. Erwin, for Defendant.]

E. H. ERWIN, a witness called and sworn on behalf of defendant, testified that from 1906 until 1909 he was a member of the City Council of the City of Forsyth, and was chairman of the committee on fire, light and water.

Direct Examination.

(By Mr. RASCH.)

I remember the occasion of the final estimate of the contractor being submitted to the City Council. The paper which you show me, of which a copy is attached to the complaint, is the final estimate that was submitted. There was not, to my knowledge, at any time filed with the City Council or presented to the City Council any other account or statement for the amounts stated in the final estimate, and I did not learn that the final estimate or account which had been submitted was not accompanied by an affidavit or verified until action had been commenced against the City. The final estimate was referred by the Council to the fire, light and water committee, and I was the chairman of that committee. The other member of that committee was Mr. Blum. The City Council minutes of May 7, 1908, were read, showing that the final estimate of the Des Moines Bridge and Iron Company was allowed.

I was in the courtroom here this morning when Mr. Farr testified with reference to his appearing before the Council. Mr. Farr never appeared before the City Council of the Town or the City of Forsyth, as the representative or attorney of the contractor, the

(Testimony of E. H. Erwin.)

plaintiffs in this case, in my presence, [65] when I was present. There never was a time during these transactions relating to the final estimate when Mr. Smith and Mr. Farr appeared before the Council and discussed the matter of the adjustment of the account and the settlement of the account with the City Council.

Cross-examination.

(My Mr. HORSKY.)

The minutes of the Council meetings show that I was present at every Council meeting. There were no matters that were of importance that happened before the Council of which there was not a record kept. As to being positive, beyond any question, that Mr. Farr was never before the Town Council, yes, sir, I am absolutely positive, beyond any question, that he was never before the Town Council at any meeting I was present at. He did not appear at any meeting, formal or informal, where I met with the Council. I never was present with any other aldermen at any time in the month of May or June, 1908, at which Mr. Farr was present in Forsyth. As to whether I recall of any time in May or June, 1908, when Mr. Farr was in Forsyth at all, I think he was, but as to what, if anything, he had to do with the Town of Forsyth, as a municipal corporation, in so far as going before any aldermen was concerned, he did not have anything, so far as I know. I simply saw him in town, but I do not remember what month it was. Judging from memory, it was somewhere in the forepart of June. He could have been at the

(Testimony of E. H. Erwin.)

Clerk's Office and I did not see him. I saw him out on the street, and whether I saw him with Mr. Smith, if I did, I don't remember it.

[Testimony of D. J. Muri, for Defendant.]

D. J. Muri, a witness called and sworn on behalf of the defendant, testified that he had lived in Forsyth for about eighteen years; was clerk of the District Court, and had been connected with the city administration since the town was incorporated in the latter part of 1904; that he is now Mayor of the [66] city, and has been such for nearly four years, it being his second term; that he was a member of the City Council during the time of the construction of the waterworks, and was President of the Council up to May, 1908.

Direct Examination.

(By Mr. RASCH.)

I heard the testimony here of Mr. Farr with reference to his appearing before the Council and filing a verified claim and verified final estimate and taking the matter of the adjustment of the differences between the contractors and the City Council up with the Council.

Q. I will ask you, Mr. Muri, whether at any time from the 7th day of May on, when the committee had made its report upon the final estimate up until the matter was disposed of in June or July, whether Mr. Farr ever appeared before the City Council in connection with the matters before the Council relating to the water plant.

(Testimony of B. Blum.)

from the first of May until some time in July, 1908, and I was present at all of the meetings of the Council during that period. I heard the testimony here of Mr. Farr as to his appearing before the Council, but Mr. Farr never, to my knowledge, appeared before the Council with reference to the differences that existed between the Town or City of Forsyth and the contractors while the matter was under consideration.

[Testimony of F. V. H. Collins, for Defendant.]

F. V. H. Collins, a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RASCH.)

I am an attorney, and have been such for twelve years; am residing at Forsyth, and have resided there for the past eight or nine years. I was City Clerk of the City of Forsyth from February, 1908, on.

I heard the testimony of Mr. Farr on the stand here, of his being at Forsyth some time between the 21st day of May and the early part of June, or perhaps some time after the 22d day of June, in which he, in company with Mr. Smith, filed with the Council or the City Clerk an amended or additional account, containing the final estimate verified and *accompany* by an [69] affidavit. Mr. Farr never filed any paper of any description with me, and neither did he present a paper of any description to the Council in my presence at any time.

Q. I will ask you, Mr. Collins, if you were present

(Testimony of F. V. H. Collins.)

at the Council meetings from the 21st day of May, when it appears that there was a Council meeting, up to the time that Mr. Farr states that he left Miles City, the early part of June, and after his return on the 22d day of June?

A. I was present at all the meetings of the Council held during that period.

There never was at any time subsequent to the 21st day of May, or before that time, any paper served upon me or filed with me by Mr. Smith or Mr. Farr in the nature of a verified account, demand or claim based upon a final estimate. The only papers filed with me by Mr. Smith, in connection with this work, was the pencil final estimate and typewritten request for the calling of a Council meeting, and accompanied with a typewritten statement of reasons for delay, followed then by the exhibit which you have just shown me, and these were the only papers filed in my office in connection with this matter. The minute book of the Council meetings shows that there were no Council meetings from the 21st day of May until the 18th day of June. There was also introduced in evidence by the plaintiffs during the trial five monthly estimates of plaintiffs under said contract, which were made and filed by them with defendant prior to the last or final estimate, and each of which estimates was paid as shown by the defendant's canceled checks, warrants or vouchers in evidence, amounting in the aggregate to \$34,960.44.

No cross-examination.

And thereupon, after the conclusion of the evi-

dence, the court rendered its decision, and with reference to the issue as to the presentation of the plaintiff's claim, based upon its final estimate, and the necessity of such presentation being accompanied by an affidavit, as required by Sections 382 to 3288 of the Revised Codes of the State of Montana, and upon the question whether the plaintiffs had sustained the burden of proof upon them to show that such presentation had [70] been made, the Court said, found and held as follows:

“I am inclined to dispose of this case now, and if you desire to make any arguments I will hear them now. I will say frankly, to commence with, it seems to me that the plaintiffs are entitled to recover, and the question is only how much, under this contract and these specifications. The case, as it appears to me, is one which has been tried in disregard to the pleadings, and the Court will consider the pleadings on both sides virtually amended so far as is necessary to conform to the proof. That is to say, this complaint seems to be a sort of a composite, a preceeding on the contract and on an approved claim. Of course, the claim after a fashion, was approved, but was approved with setoff. Now with reference to the statements, I am satisfied that the law would never hold that the plaintiffs must make the affidavits to these statements and estimates, when the city passed upon the accounts and approved them with certain deductions, regardless of the affidavit. That affidavit was waived by the consideration of these claims by the city. Suppose we should take a case where the plaintiff had carried the estimates to

the City Treasurer and had been paid the money on the estimates and that no criticism of that method had been offered. Certainly, if he were sued, he could have set up the fact that the money was paid. This final estimate, when it was finally submitted to the Council and was passed on and considered by the Council, took away from the Court the necessity of determining whether the plaintiff, through Mr. Farr and Mr. Smith, did file a claim verified with the City Clerk or with the Council. I will say again that there the burden of proof will be upon the plaintiff and without impeaching the good faith of either side, the Court believes that one side is mistaken but anyhow, the burden is not sustained. However, under the position taken by the Court, it is not material. The city approved this claim with certain deductions, and, of course, the question then comes what deductions the city was entitled to make." (The Court then took up the matter of deductions.)

To which ruling of the Court, in holding that plaintiffs were entitled to recover, notwithstanding their failure to prove that a claim had been presented to the City Council of the City of Forsyth, accompanied by an affidavit, as required by the provisions of Sections 3283 and 3288 of the Revised Codes of Montana, the defendant then and there duly excepted.

And thereupon judgment was entered in favor of plaintiffs and against the defendant for the sum of \$2332.89, together with their costs and disbursements, amounting to the sum of \$378.40. [71]

And thereupon the Court made an order granting the defendant sixty days from and after the 25th day

of January, 1913, within which to prepare and serve its bill of exceptions.

And now comes the said defendant, the City of Forsyth, and presents this, its proposed bill of exceptions in said cause, and prays that the same may be approved, settled and allowed by the Court, as provided by law.

F. V. H. COLLINS and
GUNN, RASCH & HALL,
Attorneys for Defendant.

Due service of the foregoing proposed bill of exceptions of the defendant, the City of Forsyth, is hereby acknowledged and receipt of a copy thereof accepted and admitted this 24th day of March, 1913.

EDWARD HORSKY,
Attorney for Plaintiffs.

[Stipulation as to Bill of Exceptions.]

It is hereby stipulated and agreed by and between the parties to said above-entitled cause that the foregoing proposed bill of exceptions is a full, true and correct bill of exceptions as to the proceedings had, and the evidence adduced, with reference to the issue in said cause as to whether a verified account or demand was presented to the City Council of the City of Forsyth, as required by the provisions of Section 3283 and Section 3288 of the Revised Codes of Montana, and may be approved, settled and allowed by the Court, as provided by law.

Dated this 17th day of April, 1913.

EDWARD HORSKY,

Attorney for Plaintiffs.

F. V. H. COLLINS and

GUNN, RASCH & HALL,

Attorneys for Defendant. [72]

**Order Settling, Allowing and Approving Bill of
Exceptions.**

United States of America,

District of Montana,—ss.

I, George M. Bourquin, Judge of the District Court of the United States, for the District of Montana, before whom the foregoing entitled cause was tried, do hereby certify that the foregoing is a full, true, complete and correct bill of exceptions in said action, and that the same contains all the proceedings had, and all the evidence adduced, at the trial of said cause with reference to the issue as to whether a verified account, claim or demand was presented by the plaintiffs to the defendant, in accordance with the provisions of Section 3283 and Section 3288 of the Revised Codes of the State of Montana, and the same is now by me hereby settled, allowed and approved as a true and correct bill of exceptions in said action.

Dated this 19 day of April, 1913.

GEO. M. BOURQUIN,

District Judge.

Filed April 19, 1913. Geo. W. Sproule, Clerk.

[73]

Thereafter, on June 20, 1913, Assignment of Errors was filed herein as follows, to wit: [74]

[Assignment of Errors.]

In the District Court of the United States, in and for the District of Montana.

E. W. CRELLEN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of DES MOINES BRIDGE AND IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,
Defendant.

Now comes the defendant, the City of Forsyth, in said above-entitled cause, and files the following assignment of errors, upon which it will rely upon the prosecution of the writ of error issued in its behalf in the above-entitled cause:

I.

The United States District Court, in and for the District of Montana, erred in holding and deciding that the City Council of the City of Forsyth had the right and authority to waive compliance with the provisions of Section 3283 and Section 3288 of the Revised Codes of the State of Montana, requiring that all accounts and demands against a city or town, and presented to the City Council, must be accompanied by an affidavit by the party, or his agent, stating the same to be a true and correct account

against the city or town for which the same is presented, and that the same accrued as set forth, and that the council has no authority to allow any account or demand not so presented. [75]

II.

The United States District Court, in and for the District of Montana, erred in holding and deciding that the City Council of the defendant, the City of Forsyth, had waived compliance with the provisions of Section 3283 and Section 3288 of the Revised Codes of Montana, requiring that all accounts and demands against a city or town, and presented to the City Council, must be accompanied by an affidavit by the party, or his agent, stating the same to be a true and correct account against the city or town for which the same is presented, and that the same accrued as set forth, and that the council has no authority to allow any account or demand not so presented.

III.

The District Court of the United States, in and for the District of Montana, erred in rendering judgment in said cause, and that said judgment is contrary to law and the facts, as found by the Court.

WHEREFORE, the said defendant and plaintiff in error prays that the said judgment of the said District Court of the United States, in and for the District of Montana, be reversed.

F. V. H. COLLINS and
GUNN, RASCH & HALL,
Attorneys for Defendant.

Filed June 20, 1913. Geo. W. Sproule, Clerk.

Thereafter, on June 20, 1913, Petition for Writ of Error and Order Allowing Same were filed herein as follows, to wit: [77]

In the District Court of the United States, in and for the District of Montana.

E. W. CRELLEN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of DES MOINES BRIDGE AND IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,
Defendants.

Petition for a Writ of Error and Supersedeas of the Defendant, The City of Forsyth.

The City of Forsyth, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the Court and the judgment entered in said cause on the 27th day of January, 1913, for the sum of \$2332.89, and the further sum of \$348.40 costs, comes now, by F. V. H. Collins and Gunn, Rasch & Hall, its attorneys, and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that

upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit.

And your petitioner will ever pray.

F. V. H. COLLINS and
GUNN, RASCH & HALL,
Attorneys for Defendant. [78]

**[Order Allowing Writ of Error and Fixing Amount
of Bond Thereon.]**

Upon motion of Gunn, Rasch & Hall, attorneys for the defendant, the City of Forsyth, the foregoing petition for a writ of error is hereby granted, and it is ordered that a writ of error be, and hereby is, allowed, to have reviewed, in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein on the 27th day of January, 1913, and that the amount of bond on said writ of error be, and hereby is, fixed at Thirty-five Hundred Dollars.

GEO. M. BOURQUIN,
Judge.

Filed June 20, 1913. Geo. W. Sproule, Clerk.
[79]

Thereafter, on July 8, 1913, Bond on Writ of Error was approved and filed herein, being as follows, to wit:

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, the City of Forsyth, as principal, and the

National Surety Company, a corporation organized and existing under the laws of the State of New York, and duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto E. W. Crellin, W. H. Jackson and B. N. Moss, copartners doing business under the firm name and style of Des Moines Bridge & Iron Company, in the full and just sum of Three Thousand Five Hundred Dollars (\$3,500.00), to be paid to them, their attorneys, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of July, A. D. 1913.

Whereas, lately at a session of the District Court of the United States in and for the District of Montana, in a suit pending in said court between E. W. Crellin, W. H. Jackson and B. N. Moss, copartners doing business under the firm name and style of the Des Moines Bridge & Iron Company, plaintiff, and the City of Forsyth, defendant, a final judgment was rendered against the said defendant, and the said City of Forsyth, defendant, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said E. W. Crellin, W. H. Jackson and B. N. Moss, copartners doing business under the firm name and style of the Des Moines Bridge & Iron Company, is about to be issued, citing and admonishing them to be and appear at the United States Circuit [80] Court of Appeals for the Ninth Circuit, to be holden at San

Francisco, California:

Now, therefore, the condition of the above obligation is such that if the said The City of Forsyth shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the said The City of Forsyth has caused these presents to be executed by its Mayor and its corporate seal to be affixed, and the said National Surety Company has caused these presents to be executed by its attorney in fact thereunto duly authorized and its corporate seal to be affixed hereto on this 5th day of July, A. D. 1913.

THE CITY OF FORSYTH,

By HARRY J. HURNE, Mayor.

F. V. H. COLLINS,

City Clerk.

[Seal] NATIONAL SURETY COMPANY,

[Seal] By W. K. ARMSTRONG,

Its Attorney in Fact Thereunto Duly Authorized.

The foregoing bond is hereby approved.

GEO. M. BOURQUIN,

Judge.

Filed July 8th, 1913. Geo. W. Sproule, Clerk.

Thereafter, on July 8, 1913, writ of error was duly issued herein, which writ of error is hereto attached and is in the words and figures following, to wit:
[82]

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable,
the Judge of the District Court of the United
States, in and for the District of Montana,
Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, and between the City of Forsyth, an incorporated city of the third class of the State of Montana, plaintiff in error, and E. W. Crelle, W. H. Jackson and B. N. Moss, copartners doing business under the firm name and style of the Des Moines Bridge and Iron Company, defendants in error, a manifest error hath happened, to the great damage of the said City of Forsyth, the plaintiff in error, as by their complaint appears.

We, being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the

7th day of August, 1913, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, [83] the 8th day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States, in
and for the District of Montana.

Allowed by:

GEO. M. BOURQUIN,
District Judge.

Service of the within writ of error, and receipt of copy thereof, is hereby acknowledged, this 8th day of July, 1913, without waiver of objections or right to object.

EDWARD HORSKY,
Attorney for Defendants in Error.

Answer of Court to Writ of Error.

The answer of the Honorable the District Judge of the United States for the District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit, at the day and place within contained, in a cer-

tain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,

Clerk. [84]

[Endorsed]: No. 1055. United States District Court, District of Montana. E. W. Crellen et al., Defendants in Error, vs. The City of Forsyth, Plaintiff in Error. Writ of Error. Filed and Entered Jul. 8, 1913. Geo. W. Sproule, Clerk. By _____, Deputy Clerk. [85]

Thereafter, on July 8th, 1913, a Citation was duly issued herein, which Citation is hereto attached, and is in the words and figures following, to wit: [86]

Citation [on Writ of Error (Original).]

The President of the United States to E. W. Crellen, W. H. Jackson and B. N. Moss, Copartners Doing Business Under the Firm Name and Style of Des Moines Bridge and Iron Company, and Edward Horsky, Esq., Their Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error *file* in the clerk's office of the District Court of the United States, in and for the District of Montana, wherein the City of Forsyth is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error

mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 8th day of July, A. D. 1913, and of the Independence of the United States the one hundred and thirty-seventh.

GEO. M. BOURQUIN,
United States District Judge.

Service of the foregoing citation received and copy thereof admitted this 8th day of July, A. D. 1913, without waiver of objections or right to object.

EDWARD HORSKY,
Attorney for Defendant in Error. [87]

[Endorsed]: No. 1055. United States District Court, District of Montana. E. W. Crellin et al., Defendants in Error, vs. The City of Forsyth, Plaintiff in Error. Citation. Filed and Entered Jul. 8, 1913. Geo. W. Sproule, Clerk. By _____, Deputy Clerk. [88]

**Certificate of Clerk U. S. District Court to Record,
etc.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 89 pages, numbered consecutively from 1 to 89 inclusive, is a true and correct transcript of the pleadings,

process, records, orders and judgment, and all other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to sixteen 20/100 Dollars, and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 22nd day of July, 1913.

[Seal]

GEO. W. SPROULE,
Clerk. [89]

[Endorsed]: No. 2290. United States Circuit Court of Appeals for the Ninth Circuit. The City of Forsyth, an Incorporated City of the Third Class of the State of Montana, formerly the Town of Forsyth, Plaintiff in Error, vs. E. W. Crellin, W. H. Jackson and B. N. Moss, Copartners Doing Business Under the Firm Name and Style of Des Moines Bridge & Iron Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed July 26, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY OF FORSYTH, an Incorporated
City of the Third Class of the State of Mon-
tana, formerly the TOWN OF FORSYTH,
Plaintiff in Error.

vs.

E. W. CRELLIN, W. H. JACKSON and B.
N. MOSS, Copartners Doing Business Under
the Firm Name and Style of DES MOINES
BRIDGE & IRON COMPANY,
Defendants in Error.

Brief of Plaintiff in Error.

STATEMENT OF CASE.

The defendants in error, hereinafter, for convenience, called the plaintiffs, sued the plaintiff in error, hereinafter referred to as the defendant, in the court below for \$3870.32, a balance claimed to be due them under a contract with the defendant

for the construction of a water-works system at Forsyth, Montana, (Tr. pp. 9 to 16). The contract required payment for work done and material furnished to be made in monthly installments of eighty-five per cent. of the contract price of the completed work, (Tr. p. 13), and itemized accounts were presented from time to time as the work progressed and paid. On or about April 28, 1909, the plaintiffs presented to the city council of the defendant City for allowance their final estimate, account, and claim for \$7370.32, (Tr. pp. 5 to 6), from which the City deducted \$2695.72, which was the aggregate amount of various claims held by the City against the plaintiffs, approved the account for \$4674.60, and made a payment thereon of \$3500.00, (Tr. p. 7; Tr. pp. 22 to 23; Tr. p. 8). Upon the City's refusal to pay the plaintiff's claim in full, this action was instituted, terminating in the court below by a judgment rendered in favor of the plaintiffs for \$2332.89 and costs, (Tr. pp. 45 to 47), and the defendant, claiming that error was committed in thus rendering judgment against it and in favor of the plaintiffs, brings the case here, by writ of error, for a review of the proceedings of the court below, (Tr. p. 78).

Section 3288 of the Revised Codes of Montana, (1907), hereinafter set out in full, provides that "all accounts and demands against a city or a town must be presented to the council duly itemized and accompanied by an affidavit by the party or his agent, stating the same to be a true and correct ac-

count against the city or town for the full amount for which the same is presented", and the city council, by the express terms of the statute in question, is without authority to allow or approve any account or demand not so presented. The complaint, as originally filed, failed to aver that the account upon which the action was based had been presented to the city council of the defendant City, accompanied by the statutory affidavit, but it was alleged that whatever objections, if any, there might have been to the form of said account, or to the presentation thereof, were waived, (Tr. p. 78). Having failed to allege that the claim or account was accompanied by the affidavit of its correctness as required by the statute, the defendant challenged the sufficiency of plaintiffs' complaint by general demurrer, (Tr. p. 19), but the demurrer was overruled (Tr. p. 20) by Judge Hunt, before whom it was argued, a memorandum setting forth the learned Judge's views upon the question presented was filed, in which it was held that the statutory requirements of verifying accounts and demands against cities and towns was not a matter of substance and could be waived, (Tr. pp. 47 to 49).

By way of affirmative defense, the defendant alleged in its answer to the complaint that no account or demand for any part of the amount sought to be recovered, accompanied by an affidavit, had ever been presented to the defendant. and that the action was barred by the provisions of said Sec-

tion 3288 of the Revised Codes of Montana, (Tr. pp. 26 to 27). But upon objection by defendant, interposed at the trial, to the introduction of any evidence on behalf of the plaintiffs in support of their complaint, on the ground that the same failed to state facts sufficient to constitute a cause of action, the plaintiffs sought, and obtained, leave to amend their complaint by adding thereto another paragraph, in which it was alleged that the statutory requirements had been complied with, and that the final account and claim against the City was presented to the council, accompanied by the statutory affidavit of its correctness, (Tr. pp. 33 to 34; Tr. pp. 50 to 51). The evidence adduced by the parties upon this issue is contained in the bill of exceptions, (Tr. pp. 52 to 67), and the court found that the plaintiffs had failed to sustain the burden of proof, which rested upon them, but held that the making of the affidavit was not essential and could be waived, and that it was waived by the council of the defendant City "when the City passed upon the accounts and approved them, with certain deductions regardless of the affidavit," (Tr. p. 68).

ASSIGNMENT OF ERRORS.

I.

The United States District Court, in and for the District of Montana, erred in holding and deciding that the city council of the City of Forsyth had the right and authority to waive compliance with the provisions of Section 3283 and Section 3288

of the Revised Codes of the State of Montana, requiring that all accounts and demands against a city or town, and presented to the city council, must be accompanied by an affidavit by the party, or his agent, stating the same to be a true and correct account against the city or town for which the same is presented, and that the same accrued as set forth, and that the council has no authority to allow any account or demand not so presented.

II.

The United States District Court, in and for the District of Montana, erred in holding and deciding that the city council of the defendant, the City of Forsyth, had waived compliance with the provisions of Section 3283 and Section 3288 of the Revised Codes of Montana, requiring that all accounts and demands against a city or town, and presented to the city council, must be accompanied by an affidavit by the party, or his agent, stating the same to be a true and correct account against the city or town for which the same is presented, and that the same accrued as set forth, and that the council has no authority to allow any account or demand not so presented.

III.

The District Court of the United States, in and for the District of Montana, erred in rendering judgment in said cause, and that said judgment is contrary to law and the facts, as found by the Court. (Tr. pp. 72-73).

ARGUMENT.

The only question presented for the consideration of this court is whether a compliance with the provisions of Sections 3283 and 3288 of the Revised Codes of Montana, of 1907, requiring that all accounts and demands against cities and towns must be presented to the council, accompanied by an affidavit that the same are true and correct, may be dispensed with and waived. It will be observed that the two sections are identical down to the proviso in Section 3288, and the fact of the matter is, Section 3288 is Section 4812 of the Political Code of 1895, as the same was amended in 1903, (Montana Session Laws 1903, pp. 42 to 44), but for some reason Section 4812 of the Political Code appears in the Code of 1907 as Section 3283 in its original form and as it was before its amendment, and as Section 3288 in the form as amended. They are as follows:

“3283. (Sec. 4812). *Accounts must be itemized and sworn to.*—All accounts and demands against a city or town must be presented to the council, duly itemized and accompanied by an affidavit of the party or his agent, stating the same to be a true and correct account against the city or town for the full amount for which the same is presented, and that the same accrued as set forth, and with all necessary and proper vouchers, within one year from the date the same accrued; and any claim or demand not so presented within the time aforesaid is forever barred, and the council has no authority to

allow any account or demand not so presented, nor must any action be maintained against the city or town for or on account of any demand or claim against the same, until such demand or claim has first been presented to the council for action thereon.”

“3288. *Presentation of claims. Limitation of actions.*—All accounts and demands against a city or town must be presented to the council duly itemized and accompanied by an affidavit by the party or his agent, stating the same to be a true and correct account against the city or town for the full amount for which the same is presented, and that the same accrued as set forth, and with all necessary and proper vouchers, within one year from the date the same accrued; and any claim or demand not so presented within the time aforesaid is forever barred, and the council has no authority to allow any account or demand not so presented, nor must any action be maintained against the city or town for or on account of any demand or claim against the same, until such demand or claim has first been presented to the council for action thereon; provided however, that in case the total indebtedness of a city or town has reached three per centum of the total assessed valuation of the taxable property of such city or town, as ascertained by the last assessment for state and county taxes, it shall be lawful for, and such city or town is hereby authorized and empowered to conduct its affairs and business

on a cash basis as provided and contemplated by Section 3287 (1) of this act.”

That these statutes are mandatory, and that compliance with their requirements is imperative, would hardly seem open to dispute. Judge Hunt so held as to the matter of presentation which, he says, “must be had as a condition precedent to the maintenance of an action,” but that formal verification “is not indispensable to the claim itself or to a valid presentation thereof,” (Tr. p. 48). The ruling made by the learned Judge is in direct opposition to the decisions of the Supreme Court of the State. In that connection, it should be said, however, that his attention was not called to the Montana cases when the demurrer was argued, and the conclusion which he reached was announced without being aware that the Supreme Court of the State had construed the statutes differently. As long ago as 1888 the Supreme Court of the Territory of Montana held, under a similar statute, that the itemizing and verifying of claims against municipalities was an indispensable prerequisite to their consideration and enforcement, and that a complaint which failed to allege “that the claim had been presented under oath,” was fatally defective.

First National Bank v. Custer County, 7 Mont.
464.

Followed and affirmed in

Powder River Cattle Co. v. Custer County, 9
Mont. 145.

With reference to the particular sections of the

Code involved here, the State Supreme Court has had occasion to consider them in several cases, and in every instance has emphatically and unequivocally declared that they are mandatory requiring a strict compliance with their provisions. In *Helena Water Works Co. v. City of Helena*, 27 Mont. 205, the court had before it Section 4812 of the Political Code of 1895, and discussing its provisions, on page 208, said:

“The Code requires the city council to audit all claims and demands evidenced by itemized bills, *sworn to*, before any payment is made. A claim is presented, and after an auditing (that is a hearing) by the guardians of the city treasurer, not of other people’s money, already assigned and set over to them, the account is allowed and ordered to be paid, if these guardians find that there is a debt against the city which is due and payable. *In no other way may a claim against a city be paid.* If the service and material men have no demands against the city, as contended by the city in the present case, and they do not claim that the city is indebted to them, then they may not file claims with the council for allowance and payment, and they can never get a cent. The city does not owe them anything, and the council has no business to hear them, or to order any warrant to issue for payment. If there be indebtedness, and the city is the one indebted, *then the claimants shall so swear*, and have their demands audited and established as part of the indebtedness of the city. Such is the

law, and such is the only conclusion to be drawn from the reading of the law. As we have said, *in no other way can a claim be established and paid, as the law now stands.* Expediency and emergencies arising out of extravagance or misfortune have, we think, led and forced city officials in Montana and elsewhere to adopt a plan such as suggested by counsel.” (Italics ours).

The Chief Justice, in a concurring opinion, expressed himself to the same effect, as follows:

“Nor is there any escape from the conclusions of Mr. Justice Milburn as to the proper construction of the provisions of the statute touching the payment of claims against the municipality. It is the duty of the courts to declare the law as it is, and not *to exercise their ingenuity* in trying to devise means by which its *clear and explicit injunctions may be evaded.*” (Italics ours).

The same section was again considered, after it had been amended, and in the form in which it now appears in the Revised Codes as Section 3288, in *Helena Water Works Co. v. City of Helena*, 31 Mont. 242, and construed the same way, as follows:

“If a city has so wisely administered its financial affairs that it has not reached the constitutional limit of indebtedness, every expenditure of public money made by it must be made *under the very eyes of its inhabitant*, any one of whom is afforded an opportunity to inspect the items of the proposed expenditure and register his objection to such as may appear to him unwise or unnecessary; for in

such case every item of proposed expenditure must be *incorporated in an itemized bill, duly verified, filed with the city council, audited and allowed before payment can be ordered.*" (Italics ours).

And, again, in *Palmer v. City of Helena*, 40 Mont. 498, where the court said:

"Under these conditions the city was shorn of its power to exist as a municipality. It could not conduct its government without incurring debts. This it could not lawfully do, because it was prohibited from doing so by the Constitution; and it could not proceed upon the 'pay as you go' plan, *because not permitted to pay cash for services rendered or materials furnished, under the mandatory provisions of the statute supra.*" (Italics ours).

This construction of the statute, demanding a strict compliance with all of its requirements, is decisive here. For, as was said by this court in *Flanigan v. Sierra County*, 122 Fed., on page 26:

"These decisions are binding upon this court and will be followed, regardless of the decisions upon similar questions in other states."

There is, however, upon this question unanimity in the decisions of the courts in the different states. Thus, in *Richardson v. City of Salem*, (Oregon) 94 Pac. 34, which was the principal case and authority relied on by the defendant in the argument of the demurrer in the court below, the Supreme Court of Oregon, discussing the provisions of a similar section of the laws of that State, said:

"It is admitted by counsel for plaintiff that it

was necessary for him to present his claim to the city, which he did, *but without verification*. He insists that the itemizing or verification are not conditions precedent to the bringing of the action thereon, and are matters of defense, and, therefore, may be waived, which he claims was done in this case. If setting out the items of the account and verifying the same were only for the advice and guidance of the auditing officer, possibly he might waive them, as was held in *Griswold v. City*, 116 Mich. 401, 74 N. W. 663, and in *Kennedy v. Mayor*, 34 App. Div. 311, 54 N. Y. Sup. 261, but the language of the Salem charter is imperative: 'No claim against the city shall be paid until it is first itemized and verified.' These conditions are embodied in the charter for the protection of the taxpayers, as well as to provide notice and information to the auditing body; and the complaint must allege such facts as disclose that the city is in default. In *Philomath v. Ingle*, 41 Or. 289, 292, 68 Pac. 803, 804, Mr. Justice Moore says: 'The rule is well settled that 'where the presentation of a claim or the filing of a notice is required, such notice or presentation of claim is a condition precedent to the right to maintain an action against a municipal corporation, and must be averred by the plaintiff.' * * *

* * * Section 13 of the charter quoted above, not only prescribes the manner of the presentation of the claim to the auditing body, but prohibits payments thereof until these requirements are complied with. They constitute an inhibition, not only upon

the auditing body, but also upon the recorder and mayor in issuing the warrant. *MacDonald v. Lane* (Or.) 90 Pac. 381, is quite in point on this question.”

This decision was subsequently followed and reaffirmed in *Naylor v. McColloch*, (Or.) 103 Pac., on page 71, where the court said:

“The above-cited provisions of the charter being in the interest of the general public, and a matter of positive law, it is difficult to see how the council could waive it; neither could they waive the fact that the claim was one they had no right to pay in any event, and their action in ordering it paid was a violation of the charter and void. *Richardson v. Salem*, 51 Or. 125, 94 Pac. 34, and cases there cited.”

In *Campbell v. Brackett*, (Ind.) 90 N. E. 777, the statute prohibited the allowance by the city council of any claim or demand not properly itemized and verified, and a judgment for the recovery of money paid upon a claim not so presented in compliance with the statutory provisions was affirmed, the court saying:

“The board of trustees of an incorporated town has only statutory power and can perform its functions only in the statutory way. *Zorn v. Warren-Scharf Co.*, 42 Ind. App. 213, 84 N. E. 509, and cases there cited; *Moss v. Sugar Ridge Twp.* 161 Ind. 417, 68 N. E. 896. Where the statute prescribes specifically how an act shall be performed by a statutory board, or prohibits its performance under certain conditions by such board, an act in direct violation thereof is absolutely void. *McNay v.*

Town, 41 Ind. App. 627, 84 N. E. 778, and cases cited. Here the statute above quoted prohibits in the most positive terms the allowance of a claim as appellant's claim was allowed. The act of allowance being void, all subsequent proceedings by which the money was placed in the hands of appellant were void. No title to the money received thereby passed to appellant, and it was subject to recovery wherever found. *McNay v. Town*, *supra*, and cases cited. And if, as is shown here, it was located in the bank and it could only be preserved and recovered by injunction proceedings, then such proceedings were proper."

Substantially to the same effect are:

Farley v. City of Lockport, 113 N. Y. Supp. 702;

Starling v. Bedford, (Ia.) 62 N. W. 674;

Walters v. City of Ottawa, (Ill.) 88 N. E. 651;

Purdy v. City of New York, 86 N. E. 560.

In *Bingham County v. First National Bank*, 122 Fed. 16, this court held that a provision of the Idaho statute requiring that county warrants "must distinctly specify the liability for which they are drawn and when it accrued," was mandatory, and that warrants which failed to specify when the claim accrued were void and would not support an action, nor could they be validated by any act of ratification of the county board. In discussing the statute, and its effect, the court said:

“It is thus seen that the state of Idaho has by statute conferred upon the board of commissioners of the county the power to, among other things, examine, settle, and allow all accounts legally chargeable against the county, and order warrants to be drawn on the county treasurer therefor, and has expressly declared that all such warrants ‘must distinctly specify the liability for which they are drawn, and when it accrued.’ *Is any court justified in treating such language as merely directory?* We think not. It is well settled that, if the statute under which a municipal corporation is organized and acts prescribes a particular mode in which the property of the corporation shall be disposed of, *that mode must be pursued*. Dillon on Municipal Corporations (4th Ed.) Sections 463, 578, and 536. The state of Idaho, as has been seen, authorized the board of commissioners of the defendant county to allow only legal claims against it, within which claims barred by its statute of limitations would not come. *Carroll v. Siebenthaler*, 37 Cal. 193. And it has been held that, even though the governing board of a county should allow illegal claims, it is the duty of the auditor to refuse to draw warrants therefor, and, if warrants are drawn, it is the duty of the treasurer to refuse to pay them. *Linden v. Case*, 46 Cal. 171; *Merriam v. Board of Supervisors of Yuba County* (Cal.) 14 Pac. 137; *Trinity County v. McCammon*, 25 Cal. 121.

The Bingham County case is approvingly cited, and the principle therein announced was adopted

and applied by the Supreme Court of Montana, in *In re Farrel*, 36 Mont. 254, a habeas corpus proceeding. The petitioner had been convicted of forgery for the issuing, as a deputy clerk of the District Court of Silver Bow County, Montana, of false and fraudulent juror's certificates. The statute required the clerk to give to each juror, when excused from further service, a certificate "*under seal*," stating the name of the juror, the number of day's attendance, the number of miles traveled, etc. The seal, however, had not been affixed to any of the certificates so issued, and the court held that the statute was mandatory, and in the absence of the seal the certificate could "not be made the basis of legal liability against the county," hence, they were of no legal effect, "and therefore void."

The principle that there cannot be a waiver of the mandatory provisions of a statute is universally recognized by the decisions of all the courts. Nor was any rule to the contrary laid down by the Supreme Court of Michigan in the cases cited by the plaintiffs in support of the sufficiency of their complaint in the court below. In *Foster v. Bellaire*, 86 N. W. 383, the contention that the statute involved in that case was mandatory was denied, the court saying that "the precise question presented in this case was before the court in *Griswold v. City of Luddington*, 74 N. W. 663, and was decided against the contention of counsel for defendant." In the *Griswold* case the court held that "the com-

mon council might waive such defects, under certain circumstances," and cites *Canfield v. City of Jackson*, 70 N. W. 444, which is the authority upon which all subsequent decisions to that effect are based. But the statute considered by the court in the *Canfield* case, which is set out in the opinion of the court in that case, left it to the discretion of, and made it entirely optional with, the common council whether a claim presented against the municipality should be verified or not. The statute construed by the court in that case was as follows:

‘The council shall audit and allow all legitimate claims against the city; *and when required by the common council every account shall be accompanied with an affidavit* of the person rendering it, to the effect that he verily believes that the services or property therein charged have been actually performed or delivered for the city; and that the sums charged therefor are reasonable and just, and that to the best of his knowledge and belief no set-off exists, nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim.’ (Italics ours).

The Supreme Court of Montana, having by its decisions declared the sections of the Montana Code to be mandatory, these decisions, as was said by this Court in *Flanigan vs. Sierra County*, *supra*, are binding. The plaintiffs’ failure to present their claim as required by the statute, and within the time limited for that purpose, precluded a recovery

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The Supreme Court of Montana, having by its decisions declared the sections of the Montana Code to be mandatory, these decisions, as was said by this Court in *Flanigan vs. Sierra County*, *supra*, are binding. The plaintiffs’ failure to present their claim as required by the statute, and within the time limited for that purpose, precluded a recovery

against the defendant City. It follows that the judgment in their favor was improperly rendered in the court below, and the same should be reversed.

Respectfully submitted,

F. V. H. COLLINS, and
GUNN, RASCH & HALL,
Attorneys for Plaintiff in Error.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY OF FORSYTH, an Incorporated
City of the Third Class of the State of Mon-
tana, formerly the TOWN OF FORSYTH,
Plaintiff in Error,
vs.

E. W. CRELLIN, W. H. JACKSON and B.
N. MOSS, Copartners Doing Business Under
the Firm Name and Style of DES MOINES
BRIDGE & IRON COMPANY,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

SUPPLEMENTAL STATEMENT.

In the statement of the case by plaintiff in error, (Brief 4), reference is made to Judge Bourquin's findings and decision. (Tr. 68). The opinion is a terse, lucid exposition of the legal propositions involved herein.

To quote the Bill of Exceptions, (Tr. 68),—

“The Court *said, found and held* as follows:

“I am inclined to dispose of this case now, and if you desire to make any arguments I will hear them now. I will say frankly, to commence with, it seems to me that the plaintiffs are entitled to recover, and the question is only how much, under this contract and these specifications. The case, as it appears to me, is one which has been tried in disregard of the pleadings, and the Court will consider the pleadings on both sides virtually amended so far as is necessary to conform to the proof. That is to say, this complaint seems to be a sort of a composite, a proceeding on the contract and on an approved claim. Of course, the claim after fashion, was approved, but was approved with setoff. Now with reference to the statements, I am satisfied that the law would never hold that the plaintiffs must make the affidavits to these statements and estimates, when the city passed upon the accounts and approved them with certain deductions, regardless of the affidavit. That affidavit was waived by the consideration of these claims by the city. Suppose we should take a case where the plaintiff had carried the estimates to the City Treasurer and had been paid the money on the estimates and that no criticism of that method had been offered. Certainly, if he were sued, he could have set up the fact that the money was paid. This final estimate, when it was finally submitted to the Council and was passed on and considered by the Council, took

away from the Court the necessity of determining whether the plaintiff, through Mr. Farr and Mr. Smith, did file a claim verified with the City Clerk or with the Council. I will say again that there the burden of proof will be upon the plaintiff and without impeaching the good faith of either side, the Court believes that one side is mistaken but anyhow, the burden is not sustained. However, under the position taken by the Court, it is not material. The city approved this claim with certain deductions, and, of course, the question then comes what deductions the city was entitled to make.” (The Court then took up the matter of deductions.)”

It thus appears that the particular point upon which the city failed to sustain the burden of proof was that of the claim not being “verified.” (Tr. 69.) In all other particulars, there was a compliance with the statute. No question was or could be raised as to these facts: A claim or final estimate, itemized in detail, was properly presented within proper time, considered by the City Council; no *objection* made to the *form* of the claim; the claim was allowed in part and ordered paid in part,—to the extent of \$3500.00, approximately one-half; and also that the *aldermen* did not even know until *after suit* was brought that there was any question about the claim being *verified* (Tr. 61, l. 15-19; Tr. 64, l. 1-5).

Moreover, under the contract the city had paid five monthly estimates prior to said last final esti-

mate, as shown by the defendant city's cancelled checks and warrants in evidence in the aggregate of \$34,960.44 (Tr. 67); and the city accepted the water plant, after a test duly made in accordance with the provisions of the contract "to the satisfaction of the Town Council of said Town, and by its duly qualified engineer," (Tr. 14), and passed and accepted the final estimate, making a payment thereon.

Counsel claim (page 6 of Brief) that the only question presented is whether a compliance with sections 3283 and 3288 of the Montana Codes "may be dispensed with and waived."

A more accurate statement of the *concrete* question involved would be: Where a Montana city has entered into a valid contract for the installation of a water plant, which has been constructed by the contractor, tested and accepted by the city, and all monthly estimates, five in number, have been allowed and paid, and the sixth and final estimate has been presented to and approved by the city council with certain deductions, and approximately one-half of such final estimate is allowed, paid, and no objection whatever made to the form of such claim, which is properly itemized, presented within the proper time, and complies with the statute in all other respects, and the ground of partial disallowance is solely a dispute as to certain items therein and deductions for delays claimed by the city pursuant to the contract,—can the city, in a suit by

the contractor, avoid payment of the amount found due by the court, on the ground that such final estimate or claim was not “accompanied by an affidavit?”

ARGUMENT.

I.

Under the facts shown, it was not necessary for defendants in error to present any claim to the city council.

A brief reference to certain provisions of the contract seems to be important, and these are as follows, viz.:

“In consideration of the foregoing covenants and agreements herein set forth on the part of said contractor, to be done and performed, said town hereby agrees to well and truly pay to said contractor out of the funds hereinafter stated, and in the manner hereinafter set forth, for the construction of said water system, viz,” Then follows an itemized statement giving the specific amounts to be paid for the different classes of work in the construction.

The contract further provided that the Council might require further work than as stated in the contract, such as a greater number of feet of pipe to be laid, etc., all of which were to be paid to the contractors at the actual cost thereof plus ten per cent. The contract then provided “and the said town further agrees that all payments for the work

under this contract shall be made in monthly installments of eighty-five per cent of the contract price on the completed work, being any materials built in place. The balance of the contract price herein provided for, to be paid to the contractor upon the completion and final test of said water works system, which *test* shall be to the *satisfaction of the town council*, and upon the *acceptance of said system by the town council* of said town, and by its duly qualified and acting engineer, which acceptance shall be within thirty days after the proper completion of said water works system in all respects as provided for by this contract, and that *such payments shall be made by warrants of said town drawn upon its water works fund by the order of the town council, and duly signed by its Mayor and Clerk.*”

It is undisputed that plaintiffs completed the work, that it was tested by the city and duly accepted as being complete, and that since the 30th of April, 1908, the City has had the sole and exclusive possession and control of the water works plant, and has used the same for the purpose intended; that plaintiffs presented a final estimate to the council, and that on May the 8th, 1908, said council accepted and allowed such final estimate, making a payment thereon.

Under the circumstances in this case, we submit that the statute relied upon by defendant has no application. The statute mentioned was evi-

dently enacted by the legislature for the protection of the City against exorbitant bills for supplies furnished the City, or work and labor performed for it, *without any written contract* fixing the amount to be paid and the date of payment. It was also undoubtedly intended by this legislation to prevent friends of the members of the city council from unduly furnishing labor or supplies to the City at an exorbitant price and having the same paid for without the proper investigation by the council as a body. As said by the Supreme Court of Montana, in the case of Dawes vs. City of Great Falls, 31 Mont. 9,—“It is apparent from these sections that the requirement that ‘all accounts and demands’ against the city should be submitted to the council, was for the purpose of allowing the City to audit such accounts and demands and direct their payment.” The council represented and acting for the city, and for each and every resident and taxpayer thereof, had the question fully before them as to the cost and of payment for the construction and installment of a water plant, and in the making of a contract must have considered all questions which might possibly be involved in the consideration of an account presented under the section of the statute referred to. The City promises to pay at a certain time, and in a certain manner, the consideration expressed in the contract. Nothing was left for the council to do, save accept or reject the work, and if accepted, pay the consideration stated

in the contract. There was nothing from which it could be inferred that any person was obtaining money from the council on a claim which was not fully understood and honestly assumed by the City. It has always been held by the authorities uniformly, that no claim need be *presented* to the council for the salary of any employe of the City. The employment is a sufficient *presentation* to the council to fully satisfy the statute, and the statute does not apply.

Wynne vs. Butte, 45 Mont. 417, 123 Pac. 531;
See also,

State vs. Doggett, 28 Wash. 1, 68 Pac. 340.

II.

AFFIDAVIT NOT ESSENTIAL TO ENTITLE PLAINTIFF TO RECOVER. WAIVER.

On page 8 of the brief, it is said that the statutes are mandatory, and that compliance with their requirements is imperative.

Assuming for the purpose of the argument that such statutes are mandatory, nevertheless, there may be acts and conduct constituting a waiver, and estoppel may arise.

Upon the questions of verification not being indispensable to maintain suit, and that the acts pleaded and done constituted a waiver, Judge Hunt's opinion is both sound and logical, and applies with peculiar force to the case at bar. The decision (Tr. 48) is as follows:

“The presentation of the final estimate to the council fulfilled the essential requirements of section 3283 of the Revised Codes. The object of requiring presentation is evidently to notify the council of the specific account or demand so that it may have opportunity to consider and investigate, if it so desires, before taking action.

“This rule pertains to the demand or account itself, that is to say, to the very substantial thing, rather than to the form of the account or demand. Presentation therefore must be had as a condition precedent to the maintenance of an action.

“But the provision which calls for the accompaniment of an affidavit relates to the manner in which the account or claim presented shall be supported. The verification required does not, however, affect the claim or account itself, nor is it a part thereof, for it has only to do with the writing which shall accompany the account or demand presented.

“The fact then that there can be no waiver of the requirement for presentation does not lead to the conclusion that irregularities in the form of the claim presented or in the papers which accompany the claim presented, but which do not constitute the claim or demand, cannot be waived.

“It is plain that the reasons which control the necessity for the presentation of the claim do not apply with great cogency to the formal statement in support of the claim.

“*Presentation* of the claim is the important thing, and while the formal verification ought to be had, it is not indispensable to the claim itself or to the valid presentation thereof; hence omission of such affidavit of verification is an irregularity which can be waived.

“Believing that this construction of the statute is based upon a just and well founded distinction, it follows that the acts done by the city council as pleaded in the present instance constituted a waiver of verification.”

It is claimed that the learned judge’s attention was not called to the Montana cases when the demurrer was argued, and that he reached his conclusions without being aware that the Supreme Court of Montana had construed the statutes differently. This is indeed edifying. The learned judge was well aware of these decisions and certainly with a decision which he himself had rendered in the case of

State ex rel Kaiser Water Co. vs. City of
Phillipsburg, 23 Mont. 16, 57 Pac. 405.

In Montana, mandamus had theretofore been held to be a proper remedy to enforce payment of a contract by a municipality.

State ex rel vs. Gt. Falls Water Co., 19 Mont.
518.

The Kaiser case was an application for writ of mandate to compel the auditing and allowance of the relator’s monthly water bill under a contract,

and as here, was *partly* allowed and the balance *disallowed*. The petition alleged with reference to the presentation of the bill the following:

“And your petitioner further states that its said bill was ‘duly verified’ and presented to the said City council for allowance in the sum of \$^{123.95}~~137.55~~, and that the same was approved and allowed by the said City Council in the sum of but \$140.62.”

But the complaint omitted to allege that the bill or claim was *itemized*, which, if counsel are correct, is just as essential as the affidavit; and yet a general demurrer to the complaint for insufficiency was overruled; the defendant elected to stand on its demurrer, judgment went for relator, and, on appeal, was affirmed.

How is the claim to be presented? To the *city council*; not to the *mayor*, the city auditor, to a chairman of some council committee, or to some other city functionary; but to the *city council*.

That is to say before any action can be commenced on any claim or demand, it must be *presented* to the *city council* within one year. In the case at bar, that was done; and the claim was also duly itemized. In order to entitle the party to bring an action upon the debt due him, it is not necessary that his claim must have been sworn to.

It may be assumed for the purpose of the argument and none other, that the *non-verification* or *non-itemization* justifies the council in disallowing

or refusing to order payment of the claim in that form; but the *non-verification* or *non-itemization* certainly does not invalidate the indebtedness itself, nor does the statute provide that because the claim was not verified or itemized, when presented, within one year, to the city council, therefore no action can be commenced because of it not being verified or itemized. The disallowance of the non-verified or non-itemized demand, leaves the claimant the choice of one or two alternatives; that of presenting a new or supplemental claim within the year, if he has been notified and has enough time left, or commencing suit in court, where he *must* “*verify*” the complaint.

In the case of Pearson vs. City of Seattle, 44 Pac. 884, it was held that an action may be maintained on a claim filed with the City Clerk and presented to the council, *not verified* as required by the charter, *where there is nothing in the charter forbidding an action to be maintained upon an un-verified claim*. We submit this is a condition which presents itself in this case under that part of the statute referred to. There is nothing in the Montana statute prohibiting the bringing of a suit, except that it must appear that the account was presented to the City.

The questions raised by the plaintiff in error herein have frequently been before the courts for consideration, and the following cases sustain our position:

Wright vs. Village of Portland, 76 N. W. 141;
Griswold vs. City of Ludington, 74 N. W.
663;

man v. Ogden City, 33 Utah 196, 204; 7. 444;
3 Pac. 561. W. 78;

Foster vs. Village of Bellair, 86 N. W. 383;

Moore vs. City of Detroit, 129 N. W. 715;

Lindley vs. City of Detroit, 90 N. W. 665;

Kriseler vs. LeValley, 81 N. W. 580;

Foster vs. Village of Bellair, Supra, was an action for injuries for defective sidewalk. It was conceded by plaintiff that the claim was *neither itemized* nor verified. The *council*, however, proceeded to *consider* the claim. The Supreme Court said, with reference to the itemization and verification of the claim—"It is insisted by counsel that the requirements of the statute are mandatory and cannot be waived by the common council. The precise question presented in this case was before the court in Griswold vs. City of Ludington, 74 N. W. 663 and was decided against the contention of counsel for the defendant. See also Wright vs. Village of Portland, 76 N. W. 141."

Moore vs. City of Detroit, Supra. This was an action brought by Moore and Moore against the City of Detroit for legal services performed for the Village of Fairview, which was assumed by the City of Detroit. The claims were *presented* to the City council for the City of Detroit, but not *verified*. The Court says: "The record shows, however, that

both municipalities considered a claim, the defendant, the City of Detroit, heard testimony in the matter and the payment thereof was refused by both defendants. Apparently no objection was raised to the claim for this irregularity before the council committee. We think it has been waived. *Griswold vs. City of Ludington*, 74 N. W. 663; *Wright vs. Village of Portland* 76 N. W. 141; *Foster vs. Village of Ballair*, 86 N. W. 383; *Lindley vs. City of Detroit*, 90 N. W. 665. Informal notice seems to have been served on the City Council, which referred the claim to a committee, which proceeded to investigate it. The committee took testimony concerning the claim and by the report of the committee the claim was disallowed. The Court says: "The important question is that of waiver. It is based on the fact that the Council and City Attorney, through his subordinates, acted upon the claim as presented to the council, and gave plaintiff the right to suppose that they were willing to treat the notice as sufficient. We have often decided that the common council may waive the formalities of a notice. (Citing Cases.) Without intending to hold that the the City attorney may waive notice upon him and thereby bind the City, we have no hesitation in saying that the council may do so. Whether it has done so or not is usually a question of fact to be submitted to the jury, but the facts are undisputed in this case, and we think it was proper for the Circuit Judge to instruct the Jury that by re-

ferring the claim to its committee to investigate upon its merits and through the action of its committee in doing so, it waived further notice."

In the case of *Kriseler vs. LeValley*, 81 N. W. 580, the claim was *presented* to the common council of the Village of Vasser, as night watchman and deputy marshal for the month of April, 1899, amounting to \$31.25. The Court said: "It is urged that the account presented was informal, and *not in compliance* with section 2745 Compiled Laws of 1897. The section in question is intended to protect the Village from suit without an opportunity previously offered to the Council to investigate the claim, and to do justice. *It is true the statute provides the claim shall be accompanied by an affidavit or certificate of an officer of the corporation.* Assuming that this provision was intended to apply to the account of the officer of the Village for a fixed salary, the *council* has a right to insist upon such certificate or affidavit as a condition to taking action on the claim, but it also has a right to *wave* the requirement. In this case the council saw fit to treat the claim as sufficient in form, and unanimously allowed the claim."

It seems that the statute of Michigan requires that claims presented to a village or city council for audit and allowance, must be verified and itemized. This provision in that state applies as well to an account for damages for a tort of the City, as to claims and accounts arising on contracts. In the

case of Wright vs. Village of Portland, *supra*, an account for damages was presented, which was *not verified*. A committee of the council was appointed to investigate the claim, which caused a survey to be made for the purpose of ascertaining the amount of damages. The council thereafter referred the matter to its President to settle the claim, and at his request, plaintiff appeared before him and tried to make an adjustment. The only objection to the payment of the claim was the amount, and not because it was not verified as required by the statute. The Supreme Court, by Moore, Justice, held that by not objecting to the claim on account of its not being verified, the council waived such requirements, and says:

“We do not see how any question of public policy is involved here so as to affect the question of waiver. Had this claim been allowed and paid we do not think it could be said that an illegal claim, or one contrary to public policy, had been adjusted simply because the claim was not verified. This requirement of the statute is for the benefit of the Village, and is a matter which may be used by it by way of defense. The Court construed a similar statute several times. In *Germaine vs. City of Muskegon*, 105 Mich. 213; 63 N. W. 78. Where a claim was not rejected for the reason that it was not verified, it was said that the defect was therefore waived. In *Canfield vs. City of Jackson*, 70 N. W. 444, the defense was not set up until the case was

tried. It was then raised in an application for a new trial. It was held that was too late. The case of *Griswold vs. City of Ludington*, 74 N. W. 663, in a case much like this, the claim was presented. The council did not do as much, nor take as formal action in relation to it as counsel offered to prove was done in this case. The claim was not verified. The court said 'a waiver is a mixed question of law and fact, and each must necessarily depend much upon its own peculiar circumstances and surroundings. It is a question for the court to determine whether there is any evidence tending to show a waiver; but, when there is any evidence, the Jury must determine what the intent of the party was, as a waiver is usually one of intent, as indicated by the acts and declarations of the party.' It was held the council might waive the verification of the claim and the court should have submitted the case to the jury, whether it had done so or not. In this case, if counsel could show what he offers to show, the question would have been submitted to the jury to decide whether there was a waiver on the part of the council."

The other cases cited directly sustain our contention and we will not trouble the court with quotations from them.

The position of counsel for the defendant, that the presentation of verified account cannot be waived, is clearly unsound. If it could be waived under the law in any way, it may be waived under

the circumstances alleged in the complaint.

In the case of Borghart vs. Cedar Rapids, Iowa, 68 L. R. A. 306, it is held that failure to plead in defense of an action for damages for closing a highway, that a verified account thereof was not presented to the City Clerk, is a waiver of the defense.

It is held in the case of O'Connor vs. Fon Du Lac, (Wis.) 53 L. R. A. 831, that if objection is not taken in a suit against the City, that a *verified* account had not been submitted to the council, such objection is *waived*.

If such objection is waived by failure to raise the question in the pleadings or at the trial of the suit, such objection is not jurisdictional, and is only a matter of detail in the transaction, and may be waived in the manner set forth in the complaint. We submit, therefore, first, that the case as presented by the complaint does not fall within the provisions of section 3283 and 3288 of the Revised Codes; and, second: that if it did, the defendant by and through its council, duly waived the presentation of a claim verified as provided by the statute.

III.

We shall next take up briefly a review of the decisions cited by counsel for the defendant in support of their contentions. We find but one case in all of those cited, in which it is even intimated

that the council might not waive the verification of the claim, and that is the case of *Richardson vs. Salem (Ore.)* 94 Pac. 34.

A careful examination of this opinion and a comparison of the statute of Oregon and Section 3283 Revised Codes, we believe will demonstrate the inapplicability of this decision to the matter before the Court. The statute of Oregon provides "No claim against the City shall be paid until it is first itemized and verified." Our statute provides: "And any claim or demand not so presented at the time aforesaid, is forever barred." The council has no authority to allow any account or demand not so presented." The difference between these two statutes seems to us to be very apparent, and this conclusion more especially applies when we read the remainder of section 3283 which provides: "Nor must any action be maintained against the City or Town for or on account of any demand or claim against the same, until such demand has first been presented to the council for action thereon." Taking section 3283 as a whole it provides: "First: that all accounts and demands shall be first duly itemized and verified, and must be presented within one year from the date they accrue. Two: Any claim or demand not presented within one year is forever barred. Three: That the council has no authority to allow any account or demand not so presented. Fourth: No action can be maintained against the City on account of any claim or demand, unless such

demand shall have first been presented to the council.

But, again, when we compare the language of the court in that case with the language of our own Supreme Court in the case of Dawes vs. City of Great Falls, *supra*, we insist that the case at bar is absolutely withdrawn from the decision in the Richardson case. It was insisted in the Richardson case that the itemizing or verifying the claim were not conditions precedent to bringing an action thereon, and that they were matters of defense that might be waived. The Court said “With reference to this proposition, *if setting out the items of the account and verifying the same were only for advice and guidance of the auditing officer, possibly he might waive them.*” Our own Supreme Court, in the Dawes case, held the purpose of the Statute was for auditing the claim or account. So that, we must conclude that the case at bar comes within the exception noted in the Richardson case.

In each and all of the other cases cited by counsel, it is held simply that the presentation of a claim to the City Council (In cases where such presentation is required by the statute) is a condition precedent to the right to bring suit against the City thereon. This we do not deny. The principle seems to be uniformly supported by the authorities wherever it has been before the courts. There is, however, a great difference between the principle announced by these authorities and the case at bar.

Here the account was presented, and the condition precedent was complied with.

On page 9 of the brief, the case of First Nat. Bank v. Custer County, 7 Mont. 464, is cited; and also that of Powder River Cattle Co. vs. Custer County, 9 Mont. 145. Neither of said cases is applicable to the action at bar; in the first case a complaint, which failed to allege that a claim had been *presented*, was held defective. In the Powder River Cattle Co. case, the claim against the county was never *presented*. Both are inapplicable to the facts in the suit at bar, because there is absolutely no question here as to both pleading and proof of *presentation*; *verification* was the only question at issue.

On pages 9, 10 and 11 of the Brief, three Montana cases, arising against the City of Helena, in litigation in connection with the waterworks controversy and electric light plant, are quoted from. A brief reference to said decisions, and their history, and bearing in mind the use of the quoted language as applied to the particular facts there under consideration, shows their utter inapplicability to the case at bar; and such was evidently the opinion of Judge Hunt, who, but a short time previous to the rendition of his decision herein, had had the said Helena cases before him in connection with the water litigation afterwards taken on appeal to this court, involving in the first hearing before him, the consideration of what is a debt or not a debt,

within the meaning of the constitutional inhibition against municipal indebtedness, as well as the statutory provisions found in the sections quoted (formerly Sections 4811 and 4812 of the Political Code).

The most that can be claimed for said Montana cases is to hold that the provisions of sections 3283 and 3288 are mandatory. But such statutes may be mandatory and yet the acts and conduct of the city constitute a waiver of such requirements, and operate as an estoppel.

The case of Naylor vs. McColloch (Ore.) 103 Pac. 68, does not hold that the council cannot waive a verification of the claim. It does hold that it is *difficult* to see how certain requirements of the Sumpter City charter can be waived, such as *presenting* the claim to the Recorder with the necessary evidence, that such Recorder *shall* report at the *next* council meeting with any suggestions, and that the claim *must lay over* until the next council meeting *before* it can be paid.

In reference to Campbell vs. Brackett (Ind.) 90 N. E. 777, a careful reading will show that the Court does not hold that the claim was void because *not verified*. The action was brought to recover \$400.00 illegally paid a city attorney as extra compensation shortly before the expiration of his term; the claim was neither itemized nor verified, and was allowed at the *same session* at which it was presented, when the statute required it to be presented

at least *five days before* the session of the council at which it was allowed; and the statute not only made it unlawful to violate any of its provisions, but also made it a *criminal act* for any city officer to violate its provisions directly or indirectly, under penalty of fine and removal from office. The basis of the decision is shown in the concluding paragraph as follows:

“The statute we are here considering is a salutary one, enacted for the protection of the public against scheming and unscrupulous officers, as well as a protection to honest officers and employes of a town, *by affording a means and opportunity for investigation of each claim filed before its allowance. It was enacted to prevent such hasty action as is here shown;*” thus completely distinguishing it from the case at bar, in which not even a suggestion of fraud, haste, lack of consideration, dishonesty, diversion of funds, etc., has been or can be made.

Bingham v. First National Bank, 122 Fed. 16, is inapplicable to the suit at bar. That case is authority for the proposition that an Idaho statute requiring that “county warrants must specify the liability for which they are drawn, and when it occurs” is mandatory; that county warrants failing to contain such statements were void on their face, and would not, of course, support an action against the county. The language quoted from said decision by appellant’s counsel will be found on page 22 of the 122nd Fed., and we believe it is but fair to ob-

serve that the language, quoted on page 15 of *the brief*, was employed by the court with reference to *county warrants*, as will be seen from the next paragraph following at the bottom of page 22, all of page 23, and the remainder of the opinion on page 24, where the following self-explanatory language is found: “The present action being based *solely* on the *alleged* warrants, and as they *omit matter made essential* by the statute of the state, under which they purport to have been issued, they must be adjudged *invalid*.”

Thus the court apparently emphasizes the fact that the action “was based solely on the alleged warrants,” thereby leaving open to fair inference what might have been the result in a different form of action.

In *re Farell*, 36 Mont. 254, cited on page 16, has clearly no application, in any aspect, to the facts and propositions involved in the suit at bar.

On pages 16-17 of the brief, the attempt to circumvent several of the Michigan decisions is dexterous, but ineffectual, as will appear from a reading of the decisions themselves. To illustrate: It is claimed that in *Foster vs. Bellaire*, the contention that the statute was mandatory was denied. That which was denied was not that the “statute is mandatory.” To quote the exact language of the court: “It is insisted by counsel that the requirements of the statute are mandatory *and cannot be waived by the common council*. (Italics ours.) The precise

question presented by this case was before the court in *Griswold vs. Ludington*, 116 Mich. 401, 74 N. W. 663, and was decided against the contention of the counsel for the defendant. See also *Wright vs. Village of Portland*, 118 Mich. 23, 76 N. W. 141 and cases there cited. *Sacks vs. Railway Co.* (Mich.) 84 N. W. 314; *Leach vs. Railway Co.* (Mich.) N. W. 316.”

Council’s significant omission (whether inadvertently or otherwise) of the words just italicized, —“*and cannot be waived by the common council*” is fatal to their contention. The Michigan attorneys insisted that the statute being mandatory, its provisions could not be waived. But the courts denied such contention. It thus appears that while the courts unquestionably recognize such statutes as mandatory, the contention that such provision could not be waived was denied; for there can be absolutely no question, that from an examination of the Michigan cases themselves, it will be seen that the statutes were mandatory, and the courts held, as did Judges Hunt and Bourquin, that nevertheless the action and conduct of the city, under the facts, constituted a waiver.

So in the *Griswold* case, it is true, as counsel claim, that *Canfield vs. City of Jackson*, 70 N. W. 444 is cited; but it is apparent from a reading of the *Griswold* decision, that it rests not alone upon the *Canfield* case, which is incidentally cited, but upon clear logic, sound reasoning, and common

honesty, by refusing to permit escape from an honest obligation, through attempted technical evasion.

* * * * *

The views of both the District Judges were legally correct and substantially just. The judgment should be affirmed.

Respectfully submitted,

EDWARD HORSKY,

Attorney for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY OF FORSYTH, an Incorporated
City of the Third Class of the State of Mon-
tana, formerly the TOWN OF FORSYTH,
Plaintiff in Error,
vs.

E. W. CRELLIN, W. H. JACKSON and B. N.
MOSS, Co-partners Doing Business Under
the Firm Name and Style of DES MOINES
BRIDGE & IRON COMPANY,
Defendants in Error.

Petition for Rehearing.

TO THE HONORABLE
THE UNITED STATES CIRCUIT COURT
OF APPEALS, FOR THE NINTH CIR-
CUIT:

Your petitioner, the City of Forsyth, plaintiff
in error in said above entitled cause, respectfully
asks the court to grant your petitioner a rehearing
of said cause, upon the following grounds:

1. The question whether sections 3283 and 3288 of the Revised Codes of Montana are applicable to claims and demands against cities and towns, based on contracts made and let pursuant to the provisions of sections 3278, 3279, 3280 and 3281 of the Revised Codes, was not presented nor made an issue in the case. On the contrary, the pleadings are based, and the trial of the case proceeded, upon the theory that sections 3283 and 3288 are applicable, but a recovery was allowed upon the ground that the requirement of presenting the claim or demand of the defendant in error, "accompanied by an affidavit," could be waived, and was waived, by the City Council.

2. The only question presented by the record in this case for the determination of this court was the correctness of the ruling of the trial court in holding that compliance with the requirements of sections 3283 and 3288 of the Revised Codes of Montana could be waived, and was waived, by the Council of the City of Forsyth. It was not claimed or contended, nor was a suggestion made, or intimation given, in the court below, nor upon the hearing of the case in this court, that the provisions of said sections were not applicable to claims and demands based upon contracts made and let pursuant to sections 3278, 3279, 3280 and 3281 of the Revised Codes, and the plaintiff in error was not, and has not been, afforded an opportunity to be heard upon the proposition on which this court decided the case.

3. The decision of the court eliminates from the operation of section 3283 and 3288 of the Revised Codes of Montana all claims and demands against cities and towns on contracts made and let pursuant to the provisions of section 3278 of the Revised Codes, and is in conflict with the decisions of the supreme court of the state of Montana in which said section 3283 and 3288 and said section 3278 have been construed.

I.

We respectfully invite the attention of the court to the fact that it was conceded throughout the proceedings in the trial court that the provisions of sections 3283 and 3288 of the Revised Codes of Montana are applicable to the claim of the defendant in error, and the only ground urged, upon which it was sought to escape compliance with the requirements of the statute, was that such compliance had been waived. In their complaint, after averring that the Council considered and acted upon the claim,

“as regular in form and properly presented,”

the plaintiffs allege,

“that whatever, if any, objection there might have been to the form of said final estimate, account, or claim, *or to the presentation there-*

of, and amount thereof, were by the action of said defendant, by and through its City Council, *duly waived*, and defendant is estopped and cannot be heard to make any objection in the premises.” (Tr. p. 8.)

The sufficiency of the complaint was challenged by demurrer, based upon a failure to allege presentation of the claim in manner and form as required by the statute. In overruling the demurrer Judge Hunt held that the statute applied, but considered the complaint to be sufficient, because:

“The presentation of the final estimate to the council fulfilled the essential requirements of section 3283 of the Revised Codes,” (Tr. p. 47).

And in that connection, the learned Judge further said:

“Presentation therefore must be had as a condition precedent to the maintenance of an action. But the provisions which call for the accompaniment of an affidavit relate to the manner in which the account or claim presented shall be supported.” (Tr. p. 48).

The answer affirmatively alleged failure to comply with the statutory requirements, and so fully was it conceded on all sides that sections 3283 and 3288 of the Revised Codes were applicable, that on

the day of the trial, January 22, 1913, and after an objection to the introduction of evidence in support of the complaint, as it then stood, had been denied, the defendants in error, plaintiffs below, applied for and obtained leave to amend the complaint, and did amend it, by alleging presentation of the claim, duly itemized, (Tr. p. 33),

“accompanied by an affidavit stating the same to be a true and correct account against said town for the full amount for which the same was presented, and that said claim and demand accrued as set forth,” (Tr. p. 34).

The plaintiff failed to sustain the burden of proof upon this issue, but the court nevertheless permitted a recovery, not, however, because sections 3283 and 3288 were inapplicable, but because the

“affidavit was waived by the consideration of these claims by the City,” (Tr. p. 68).

The finding of the trial court so made was a finding upon the issue squarely presented by the pleadings and proof, and upon the issue on which the case was submitted to this court. It was for the purpose of securing a review by this court of this particular ruling of the trial court, and for that purpose only, that the case was brought here. The error assigned was that,

“The United States District Court, in and

for the District of Montana, erred in holding and deciding that the City Council of the City of Forsyth had the right and authority to waive compliance with the provisions of section 3283 and section 3288 of the Revised Codes of Montana," (Tr. p. 72).

No reference was made at any time, either in the court below, or in this court, to sections 3278, 3279, 3280 and 3281 of the Revised Codes, nor had it ever been claimed or contended, intimated or suggested, that these sections of the Code had the remotest bearing upon the question presented to this court for determination by the record of the case. It was tried in the court below, and heard and submitted here, upon the theory that sections 3283 and 3288 were applicable, and the only disputed question was whether compliance with their requirements could be waived. The action was not litigated at any stage upon any other theory, and, as was said by the supreme court of Indiana, in the case of *Feder v. Field*, 20 N. E. on page 131:

"The law is well settled that a complaint must proceed upon a definite theory; that the case must be tried on the theory constructed by the pleadings, and such a judgment as the theory warrants must be rendered, and no other or different one."

And, as was said by the circuit court of appeals,

for the eighth circuit, in *Illinois Central R. C. v. Egan*, 203 Fed. on page 939:

“Nor is it permissible for one who tries his case upon one theory to change his position in the appellate court and ask for a reversal upon another and inconsistent theory.”

II.

Sections 3283 and 3288 of the Revised Codes require that “all accounts and demands” must be presented to the Council “duly itemized and accompanied by an affidavit,” and “any *claim* or demand *not so presented*” within one year after the same accrued is forever barred. By subdivision 63 of section 3259 of the Revised Codes of Montana, the Council is given plenary power,

“To make any and all contracts necessary to carry into effect the powers granted * * * and to provide for the manner of executing the same,”

but the general authority so conferred to make contracts is subject to the limitations and restrictions contained in section 3278, which requires all contracts for work, supplies and materials involving an expenditure exceeding \$250.00 to be let to the lowest responsible bidder. That the only purpose of sec-

tion 3278 was to prescribe the mode of making and entering contracts exceeding the amount of expenditure therein mentioned was expressly held by the supreme court of Montana, in *Missoula St. Ry. Co. v. City of Missoula*, 47 Mont. on page 95, where the court, in discussing the provisions of subdivision 63 of section 3259, and of section 3278, says:

“The mode of exercising the power granted by the former section is subject to the limitation prescribed in the latter.”

And, so it was held by the same court, in *Helena Water Works Co. v. City of Helena*, 31 Mont. 243, a case involving the making of a contract under the provisions of said section 3278 of the Revised Codes, (the very notice calling for bids pursuant to the requirements of said section 3278 appearing on page 244 of the reported case), in which it was intended to make payments for supplies and materials furnished in cash, that the business of the city could not be managed or carried on in that way, because, by the provisions of section 3283 and 3288 of the Revised Codes,

“*Every expenditure* of public money made by it must be made under the very eyes of its inhabitants, anyone of whom is afforded an opportunity to inspect the items of the proposed expenditure and register his objection to such as may appear to him unwise or un-

necessary; for *in such case* every item of proposed expenditure must be incorporated in an itemized bill, *duly verified*, filed with the City Council, audited and allowed before payment can be ordered.”

So, likewise, in *Palmer v. City of Helena*, 40 Mont. 498, the contract was one which the City was about to make, pursuant to the provisions of section 3278, the Mayor and City Council having

“proceeded to call for sealed bids as a preliminary step for letting contracts for the purchase of materials, apparatus and machinery to be used in the installation of a lighting plant.

* * * The intention was to let contracts for the purchase of the materials required and proceed at once to the installation of the plant. By the terms of the advertisement, the materials were to be paid for in cash.”

The supreme court affirmed the action of the trial court in enjoining the City from making the proposed contracts, upon the ground that under the provisions of section 3283 and 3288,

“all claims against it for services rendered or materials furnished must be audited and allowed as such before they can be paid, and thus become debts within the meaning of the prohibition.”

There is nothing in section 3278, or any of the succeeding sections referred to by this court in the decision rendered in the case at bar, regarding the management of the fiscal affairs of cities and towns, but, as was said by the supreme court of Montana, in the Missoula Street Railway Company case, *supra*, these sections simply prescribe the mode in which contracts involving an expenditure exceeding \$250.00 shall be made. What is more, as has been pointed out, the supreme court of Montana has expressly held that claims and demands, based upon such contracts, are governed and controlled by the requirements of section 3283 and 3288 of the Revised Codes.

See, also:

Oshkosh Water Works Co. v. Oshkosh, 187
U. S. 437.

III.

The effect of the construction placed by this court upon sections 3278, 3279, 3280 and 3281 of the Revised Codes of Montana eliminates from the requirements of section 3283 and 3288 all claims and demands arising upon contracts let by cities and towns, pursuant to the provisions of section 3278. No question was presented by the record calling for a construction of that provision of the Code, and

there was no issue raised requiring a determination of its purpose and effect. No opportunity was afforded the plaintiff in error to argue or discuss the proposition upon which the decision of this court is made to turn, because, as already pointed out, there was no claim or contention made at any time that sections 3278-3281 had any bearing on the case. Besides, the only object which section 3278 was intended to serve is, as stated by the court in *Ford v. Great Falls*, 46 Mont. 309,

“to prevent favoritism and to secure to the public the best possible return for the expenditure of the funds which the property owners are required to furnish, through the payment of taxes and assessments.”

That this is the only purpose which a statute like section 3278 of the Revised Codes of Montana is intended to serve has been uniformly declared by all the courts in which the question has been considered and determined. Judge Dillon, in the last edition of his work on municipal corporations, (2 Dillon Mun. Corp. par. 802) states the rule as follows:

“In discussing the nature of the *contracts which are excepted* from the operation of statutes requiring competitive bidding, the court has said that the purpose of the statute is to insure economy in the public administration, and honesty, fidelity, and good morality in the ad-

ministrative officers. Competitive offers or bids have *no other object* but to insure economy and exclude favoritism and corruption in the furnishing of labor, services, property, and materials for the uses of the city. *This is the only purpose of the statutes, and when this effect is given to them, nothing further is needed.*" (Italics ours).

For these reasons we respectfully ask that a rehearing of said cause be granted, in order that there may be afforded to the plaintiff in error an opportunity to be heard upon the question whether sections 3278-3281 have the effect given them by this court, and operate to relieve holders of claims, based upon contracts, made pursuant to section 3278 of the Revised Codes of Montana, from a compliance with the mandatory requirements of section 3283 and 3288 of said Codes.

Respectfully submitted,

F. V. H. COLLINS, and
GUNN, RASCH & HALL,

Attorneys for Plaintiff in Error
and Petitioner.

We, the undersigned, M. S. Gumm, Carl Rasch and E. M. Hall, counsel and attorneys for the City of Forsyth, the plaintiff in error and petitioner, do hereby certify that in our judgment the foregoing

petition for a rehearing is well founded and that the same is not interposed for delay.

N. S. Linn
.....
Lure Ranch
.....

Chas. H. Hall
.....

Counsel for Plaintiff in Error
and Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY OF FORSYTH, an incorporated
City of the Third Class of the State of Mon-
tana, formerly the Town of Forsyth,
Plaitiff in Error,
vs.

E. W. CRELLIN, W. H. JACKSON, and B.
N. MOSS, copartners Doing Business under
the Firm Name and Style of DES MOINES
BRIDGE & IRON COMPANY,
Defendants in Error.

ANSWER TO PETITION FOR RE-HEARING.

I and II.

On page 3 of the petition, it is claimed, "that it was conceded throughout the proceedings in the trial court that the provisions of sections 3283 and 3288 of the Revised Codes of Montana are applicable

to the claim of the Defendants in Error, and the only ground argued upon which it was sought to escape compliance with the requirements of the statute are that such compliance had been waived.” It is also claimed (page 6) “that the action was not litigated at any stage upon any other theory.”

As to both of these assertions, and the accuracy of the facts claimed in alleged grounds I and II (pages 1 and 2 of the petition), we respectfully but *emphatically* join issue with the plaintiffs in error.

For the information of the court upon these features, we herewith file as an exhibit a certified copy of the typewritten brief of Defendants in Error, in opposition to the city’s demurrer in the lower court, marked “Exhibit A.” It will be seen therefrom on pages 1, 2, 3, 4 and ending on page 5, that the identical proposition in question was litigated in the *trial* court.

To quote from our brief in the trial court:

“THAT IT WAS NOT NECESSARY, UNDER THE CIRCUMSTANCES DISCLOSED BY THE COMPLAINT IN THIS ACTION, FOR PLAINTIFFS TO PRESENT ANY CLAIM TO THE CITY COUNCIL UNDER THE PROVISIONS OF SECTIONS 3282 AND 3288 OF THE REVISED CODES.”

And again in *this* Court, in our brief, the very first subdivision thereof (I), pages 5 to 8 inclusive,

deals with the same proposition (page 5) under the following caption:

“UNDER THE FACTS SHOWN IT WAS NOT NECESSARY FOR DEFENDANTS IN ERROR TO PRESENT ANY CLAIM TO THE CITY COUNCIL.”

It may be that counsel for plaintiffs in error did not attach much importance to the point in question and apparently such was their attitude on oral argument in the appellate court. But merely because the learned counsel *so* regarded the point, affords no valid reason why this court should now be asked to grant a re-hearing.

II.

At the bottom of page 8 and top of page 9, there is an alleged quotation from the case of Helena Waterworks Co. vs. City of Helena, 31 Mont. 243, 244, but a reading of such case discloses no such language. There is such language in *another* Helena case, which was under different conditions of fact and was canvassed in the briefs of both plaintiff and defendants in error herein. And also upon oral argument, the court will probably recall the undersigned dwelt at length upon the *history*, and the particular facts involved in the Helena cases, in the water and light controversies from that city,

etc., and the closing retort thereto by opposing counsel was in substance: "This suit does not involve the troubles of the City of Helena. No doubt the City of Helena was very badly treated by the water company in those cases." We advert to this by way of reminding counsel that all that is now advanced under this head has heretofore been orally discussed, and was considered in the briefs herein.

Moreover, the court's opinion herein itself affords the best answer upon this branch of the petition for re-hearing wherein such cases were considered for the purpose of the argument for all that counsel claimed for them. It thus appearing that there is neither anything new or which has not been heretofore presented, discussed and correctly decided herein, no tenable reason for a re-hearing has thus far been urged.

III.

It is next asserted that the construction placed by this court upon Sections 3278, 3279 and 3281 of the Montana Revised Codes eliminates from the requirements of sections 3283 and 3288, upon all claims arising upon contracts with cities and towns pursuant to section 3288. No such result will necessarily follow. Again it is erroneously claimed that —"no opportunity was ever afforded the plaintiff in error to argue or discuss the proposition upon

which the decision of this court is made to turn,” (page 11 of Brief).

In the light of our typewritten brief in the court below, and our printed brief on appeal herein, and the oral arguments on appeal, we again reply to counsels’ statements as probably being an unconscious lapse of memory. It is apparent that this Court in the able opinion rendered holds that under such *concrete* facts as appear in this suit, it was not designed or intended that sections 3283 and 3288 should apply to claims against the city similar to the one in suit. And while it might be necessary to *present* a claim to the council before suit, “yet it was not the purpose of the statute that such claims should be *verified* as a condition precedent to the city council’s allowance or to the institution of an action against the city.” In the case at bar, confessedly the Bridge Company on every occasion *presented* its claim. Moreover, had there been any possible question that the bids for the contract had not been regularly advertised for, the contract regularly awarded, proper steps taken for alterations, etc., as required by sections 3278, 3279, 3280 and 3281, it may be assumed that the same would have been pleaded as defenses in the answer; otherwise the presumption must obtain that the contract was regularly awarded, entered into and carried out. Therefore to quote counsel’s quotation (page 11 of brief), from Ford vs. Gt. Falls, 46 Mont. 369,

the purpose of the statutes "to prevent favoritism, and to secure to the public the best possible return for the expenditure of the funds which the property owners are required to furnish through the payment of taxes and assessments" was fully subserved; the public having thus received such results, the empty formula of an affidavit to a claim already presented pursuant to a contract on which there had theretofore been five payments, and tests and acceptance of the water system having been made and full opportunity afforded for any possible objection and none registered, would mean at the best technicality carried to the extreme of being ridiculous. With an opinion that has twice been sustained in the trial court, which has again been justly affirmed in the Appellate Court, and which is not in conflict with the decisions of the Montana Supreme Court, we respectfully submit that no grounds for re-hearing have been presented and the petition should be denied.

Very respectfully,

EDWARD HORSKY,

Attorney for Defendants in Error.

Feb. 18, 1914.

No. 2294

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN COMMERCIAL COMPANY,
Plaintiff in Error and Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant in Error and Appellee.

Transcript of Record.

Upon Writ of Error to and Upon Appeal from the
United States District Court of the Territory
of Alaska, Fourth Division

FILED

AUG 25 1913

No. 2294

United States
Circuit Court of Appeals

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NORTHERN COMMERCIAL COMPANY,
Plaintiff in Error and Appellant,
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Defendant in Error and Appellee.

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Upon Writ of Error to and Upon Appeal from the
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Index.	Page
Judgment on Report of Referee.....	12
Motion for New Trial.....	63
Motion to Confirm Referee's Report and for Judgment Thereon.....	59
Motion to Set Aside Report of Referee.....	56
Order Allowing Appeal and Fixing Amount of Appeal Bond....	78
Order Allowing Writ of Error and Fixing Bond	77
Order Denying Motion for New Trial.....	65
Order Directing Filing of Statement of Facts, Staying Proceedings, etc.....	10
Order Directing That Original Statement of Facts be Supplemented, etc.....	35
Order Extending Time Within Which to Perfect Appeal.....	91
Order Relative to Supersedeas Bond on Writ of Error..	80
Order Settling and Allowing Bill of Exceptions	68
Order That Northern Commercial Co. is Liable for License Tax; Directing Filing of Amended Statement of Agreed Facts, etc..	38
Petition for Appeal.....	71
Petition for Writ of Error.....	69
Praecipe for Transcript.....	1
Proceedings had August 19, 1911.....	15
Report of Referee.....	53
Report of Proceedings and Testimony Before Referee.....	44
Stipulation Concerning Bill of Exceptions....	66
Stipulation Relative to Printing Record.....	3
Supplemental Statement of Facts.....	37

Index.

Page

**TESTIMONY ON BEHALF OF DEFEND-
ANT:**

HEILIG, A. R.....	30
Cross-examination... ..	32
RICHMOND, VOLNEY....	19, 47
Cross-examination... ..	21
Writ of Error.....	87

[Title of Court and Cause.]

Names and Addresses of Attorneys of Record.

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in Error and Appellees, Fairbanks, Alaska.

McGOWAN & CLARK, Attorneys for Plaintiffs in
Error and Appellants, Fairbanks, Alaska. [1*]

*In the District Court for the Territory of Alaska,
4th Division.*

No. 657.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN COMMERCIAL COMPANY,

Defendant.

Praecipe for Transcript.

To C. C. Page, Clerk of the Above-named Court:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, under the writ of error and appeal heretofore perfected to said Court, including all papers, both on writ of error and on appeal in but one record, in accordance with the order of this Court of May 24, 1913, and will include in said transcript the following papers, to wit:

- (1) Statement of facts without action, filed 31 December, 1906;

*Page-number appearing at foot of page of original certified Record.

- (2) Order staying proceedings, filed 2 January, 1907;
- (3) Judgment on report of Referee, filed 5 June, 1912;
- (4) Bill of exceptions, settled 9 December, 1912;
- (5) Petition for writ of error, filed 20 May, 1913;
- (6) Petition for appeal, filed 20 May, 1913;
- (7) Assignment of errors to be used both on writ of error and appeal direct, and both filed 20 May, 1913;
- (8) Order allowing writ of error and fixing bond, filed 20 May, 1913;
- (9) Order allowing appeal and fixing amount of appeal bond, filed 20 May, 1913;
- (10) Order relative to supersedeas bond on writ of error, filed 20 May, 1913;
- (11) Bond on appeal and supersedeas, filed 20 May, 1913;
- (12) Designation of place for hearing of writ of error and appeal, filed 24 May, 1913;
- (13) Writ of error, dated 19 May, 1913;
- (14) Citation on writ of error, dated 19 May, 1913;
- [3]
- (15) Citation on appeal, dated 19 May, 1913;
- (16) Order extending time within which to file appeal, filed 24 May, 1913;
- (17) Praeceptum for transcript;
- (18) Stipulation relative to printing record;

This transcript to be prepared as required by law, the orders and rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk

of said United States Circuit Court of Appeals for the Ninth Circuit on or before the first day of August, 1913, pursuant to the order of this Court of 24 May, 1913, extending time and ordering but one record.

McGOWAN & CLARK,
Attorneys for Defendant.

Stipulation Relative to Printing Record.

Due service of the foregoing praecipe is admitted, and it is hereby stipulated that the papers and records enumerated therein shall constitute the record to be used on the hearing, both of the writ of error and of the appeal direct in the above-entitled cause; that the same may be printed in one record; and that, in the printing of said record for the consideration of said United States Circuit Court of Appeals for the Ninth Circuit on writ of error and direct appeal, the title of the court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted, in the place of said title in all papers, in all other parts of said record, the words "Title of Court and Cause." [4]

Dated at Fairbanks, Alaska, this second day of June, A. D. 1913.

JAMES J. CROSSLEY,
United States Attorney,
Attorney for Plaintiff.
McGOWAN & CLARK,
Attorneys for Defendant.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. N. C. Co.

Praeceptum for Transcript. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 2, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [5]

**[Agreed Statement of Facts and Stipulation to
Submit Controversy Without Action, etc.]**

[Title of Court and Cause.]

Whereas, a question in controversy has arisen between the United States of America, and the Northern Commercial Company, as to the payment of a certain license fee or tax of ten cents per ton on freight handled or stored by it at the town of Chena, Alaska, and elsewhere in the Territory of Alaska, and which question in controversy might be the subject of an action or actions in the courts of the District of Alaska, and the parties hereto have agreed to submit the same to the determination of the above Court without action, under the provisions of Chapter 28 of the Code of Civil Procedure of the District of Alaska, and have agreed to the following state of facts upon which the said question in controversy shall be submitted to this Court:—

I.

The defendant is a corporation duly incorporated under and by virtue of the Laws of the State of New Jersey, and carrying on a general merchandise and transportation business in the Territory of Alaska.

II.

That Section 460 of the Code of Criminal Procedure of the District of Alaska, as amended by Section 29 of the Political Code of the said District, provides: "That any person or persons, corporation or com-

pany, prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska, shall first apply for permission so to do [6] from the District Court or a subdivision thereof, in said District, and pay for said license for the respective lines of business and transportation, as follows, to wit:

. . . . "Public docks, wharves and warehouses, ten cents per ton on freight handled or stored."

III.

That during the last three years, defendant has been carrying on a merchandise and transportation business in the Territory of Alaska, and has handled a large amount of freight for itself and its shippers, a portion of which freight has been landed at the town of Chena for transportation from that point by rail to the town of Fairbanks.

IV.

That defendant contends that it has not been conducting a public dock, wharf or warehouse at Chena aforesaid, but it maintains at said town of Chena, a building within which it at certain times stores general merchandise belonging to it and to its shippers.

V.

That said defendant contends that it does not maintain or conduct a public dock, wharf or warehouse at Fairbanks, but it does maintain at Fairbanks aforesaid, warehouses within which it stores merchandise belonging to it, and which it transports by its steamboats from points outside of Alaska to said town of Fairbanks.

VI.

That said defendant has a wharf and warehouse on the river bank in front of its said premises in Fairbanks aforesaid, at which steamboats owned by it, land and unload the freight belonging to the said defendant and its shippers; but that no wharfage charge, dockage charge or storage charge is made for freight so landed upon said wharf. [7]

VII.

That said defendant is not engaged in the business of prosecuting or attempting to prosecute public docks, wharves or warehouses within the Territory of Alaska, and all docks, wharves or warehouses owned by it are maintained for the purpose of handling and holding goods, wares and merchandise belonging to the defendant itself, or the persons for whom it ships.

VIII.

That defendant does not accept goods on storage for hire, nor does it permit boats other than its own to land at its warehouses or docks for the purpose of unloading goods for hire.

IX.

That a controversy has arisen between the parties hereto, as to the construction of that portion of Section 460 hereinbefore set out, the defendant contending that it should not be compelled to pay a license fee of ten cents per ton on freight handled or stored by it, and the District Attorney representing the United States of America, in the Third Judicial Division of the District of Alaska, does not concede the correctness of the contentions made by defend-

ant, and hereby consents that the controversy aforesaid be submitted to the Court for construction, therefore it is consented by the parties hereto that the construction of said section may be submitted to the Court for determination.

X.

That it is further stipulated by the parties hereto that this statement may be amended from time to time either at or before the final argument before the Court, so as to set out fully all the facts necessary to enable the Court to determine the matters in controversy; and in that connection either of the parties hereto may take such depositions or other testimony as by them may be deemed necessary to establish the gross amount of tonnage handled by the defendant or to more fully explain any of the matters herein set forth. [8]

XI.

That it is stipulated by the District Attorney aforesaid, for and on behalf of the plaintiff, that if the Court shall determine that the defendant should have paid the license fees aforesaid, or any of them, and the defendant within five days after the final judgment in this matter, shall pay in to the Clerk of this Court the amount that it should have paid in the first instance under the section aforesaid, and shall pay any costs of these proceedings, that thereupon it shall be exonerated from payment of any further penalties or fines under the provisions of the Code aforesaid.

XII.

That it is stipulated by the parties hereto that

there has been no endeavor on the part of the defendant to avoid payment of the licenses aforesaid if defendant is lawfully chargeable therewith, and in that connection defendant expressly avers that it is acting in good faith in this connection and stands ready and willing at any time upon request of the District Attorney to pay into court, within three days after such request, a sufficient sum of money to cover all licenses that it may be determined that it is properly chargeable with, and such further amount as will cover the costs of these proceedings, or to give such bonds therefor as shall be satisfactory to the District Attorney, or to the Court.

XIII.

It is stipulated and agreed by parties hereto that this controversy is real and that these proceedings are taken in good faith to determine the rights of the parties and that by reason of these proceedings the defendant shall in no wise be prejudiced.

XIV.

That it is further stipulated by the parties hereto in the event that the above Court should determine herein that defendant should pay the license fee aforesaid, that thereupon a referee [9] may be appointed to ascertain the amount of tonnage upon which said fee should be paid, and to report to the Court, said report to be subject to review by the Court the same as in other matters.

XV.

That it is hereby stipulated that should either of the parties hereto be dissatisfied with the decision of the Court, in this matter, that it may prosecute an

appeal therefrom, the same as it could from an ordinary judgment of said Court.

WHEREFORE, the parties hereto do hereby submit the foregoing to the above Court for its decision without action, in accordance with the provisions of Chapter 28 of the Code of Civil Procedure of the District of Alaska.

Dated Fairbanks, Alaska, this 29th day of December, A. D. 1906.

N. V. HARLAN,
District Attorney in and for the Third Division, District of Alaska, Attorney for Plaintiff.

McGOWAN & CLARK,
Attorneys for Defendant.

United States of America,
District of Alaska,—ss.

Volney Richmond, being first duly sworn, deposes and says: That the defendant is a private corporation. That I am the resident agent for the defendant above named, and am the person upon whom summons should be served in an action against said defendant. That the controversy set forth in the foregoing petition is real and these proceedings are taken in good faith to determine the rights of the parties therein.

VOLNEY RICHMOND.

Subscribed and sworn to before me, this 19th day of December, 1906.

[Seal] JOHN A. CLARK,
Notary Public in and for the District of Alaska.

United States of America,
District of Alaska,—ss.

N. V. Harlan, being first duly sworn, deposes and says: I am the United States District Attorney for the Third Judicial Division of the District of Alaska. That the United States is a party to the foregoing controversy. That the controversy set forth in the foregoing petition is real and that these proceedings are instituted in good faith to determine the rights of the parties therein.

N. V. HARLAN,

Subscribed and sworn to before me, this 31st day
of December, A. D. 1906.

[Seal]

JOHN A. CLARK.

Notary Public in and for the District of Alaska.

[Endorsed]: No. 657. U. S. District Court, District of Alaska, Third Division. United States of America vs. Northern Commercial Co. Statement on Submission Without Action. Filed in the District Court, Territory of Alaska, 3d Division. Dec. 31, 1906. Edward J. Stier, Clerk. By E. A. Henderson, Deputy. [11]

[Title of Court and Cause.]

**Order [Directing Filing of Statement of Facts,
Staying Proceedings, etc.].**

It appearing to the satisfaction of the Court from the Statement of Facts on Submission Without Action entered into by and between the above-named parties that a question in controversy, which might

be the subject of an action in a court of record, exists between said parties, and that a proper case exists for the submission of such question to the determination of this court; and upon motion of N. V. Harlan, Esq., United States Attorney for the Third Judicial Division, District of Alaska, attorney for plaintiff, and who is acting in this matter under advice received from the Attorney General of the United States of America, and Thomas A. McGowan, one of the attorneys for defendant, appearing and consenting thereto,

IT IS THEREFORE HEREBY ORDERED: That the Clerk of this court file the Statement of Facts on Submission Without Action this day presented to the Court, and that from this time, this Court shall have jurisdiction of the controversy therein set out as if the same were an action pending; and that all proceedings in the District Court for the Third Division of Alaska against the defendant for the collection of the license fee or tax, mentioned in the aforesaid statement, shall be stayed, pending the final determination of these proceedings.

It is further ordered that a copy hereof, to which shall be annexed a copy of the Statement of Submission filed, shall be served on all parties interested in this proceeding. [12]

Done in open court this 31 day of December, A. D. 1906.

JAMES WICKERSHAM,
District Judge.

Entered in Court Journal No. 7, page 144.

Consented to:

N. V. HARLAN,

Attorney for Plaintiff.

McGOWAN & CLARK,

Attorneys for Defendant.

Attest:

[Court Seal]

EDWARD J. STIER,

Clerk District Court for the Territory of Alaska,
Third Division.

[Endorsed]: No. 657. U. S. District Court, District of Alaska, Third Division. U. S. of America, vs. Northern Commercial Co. Order. Filed in the District Court, Territory of Alaska, 3d Division. Jan. 2, 1907. Edward J. Stier, Clerk. By E. A. Henderson, Deputy. [13]

*In the District Court for the Territory of Alaska,
Fourth Judicial Division, at Fairbanks.*

No. 657.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN COMMERCIAL COMPANY,

Defendant.

Judgment on Report of Referee.

An order having been heretofore, to wit, on the 24th day of August, 1911, duly given, made and entered in the above-entitled action, in which, among other things, it was ordered that the defendant,

Northern Commercial Company, is liable to pay to the United States a license tax of ten cents (10¢) per ton on freight consigned to others than the defendant handled on its public wharf in the town of Fairbanks, Alaska, and by which order Guy B. Erwin, Esq., an attorney of this Court, was appointed a Referee to take proofs as to the amount of such freight so handled on its public wharf, and the said Referee having been attended by the respective parties and their counsel, and having taken testimony as to the amount due from the defendant by reason of the license fee or tax upon such freight so handled upon said public wharf of defendant, and having heretofore on the 16th day of May, 1912, filed his report in writing in which report it appears that there is due from the Northern Commercial Company, a corporation, to the United States, the sum of Two Thousand One Hundred Ninety-nine Dollars and Ninety-four Cents (\$2,199.94) on the total amount of freight handled upon its said public wharf at Fairbanks, Alaska, during the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911, inclusive, belonging, consigned to or consigned by persons or corporations other than the defendant herein, said amount of freight so handled as found by the said Referee being 21,999.42 tons, which report of said [14] Referee contains certain statements or findings of fact and conclusions of law which, by the consent of counsel for the respective parties hereto, may be used by the Court as its and in lieu of findings of fact and conclusions of law of this Court, the defendant reserving an exception as to substance, but waiving

objection as to the form thereof, and the said defendant having made a motion to set aside and having filed objections and exceptions to the said report, or certain parts thereof, which motion, objections and exceptions have been heretofore overruled by the Court, to which ruling defendant excepted, which exception is hereby allowed.

NOW, THEREFORE, on motion of counsel for plaintiff, It is ordered, adjudged and decreed that the said report of the said Referee, including the aforesaid findings of fact and conclusions of law, be in all respects approved and confirmed.

It is further ordered, adjudged and decreed that the above-named plaintiff, United States of America, do have and recover from the defendant, Northern Commercial Company, a corporation, the sum of \$2,199.94, together with its costs and disbursements herein.

Done in open court this 5th day of June, 1912.

PETER D. OVERFIELD,

District Judge.

Entered in Court Journal No. 12, page 52.

[Endorsed]: Original. No. 657. In the District Court of the United States for the 4th Div'n of Alaska. United States of America vs. Northern Commercial Company. Judgment on Report of Referee. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 5, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [15]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard on Saturday, the nineteenth day of August, A. D. one thousand nine hundred and eleven, at Fairbanks, Alaska, before the Honorable Peter D. Overfield, Judge of said Court, and the Honorable Edward E. Cushman, Judge of the District Court of the Territory of Alaska, Third Division, the Government being represented by the Honorable James J. Crossley, United States Attorney for the Fourth Division of Alaska, and the Honorable John Knox Brown, Assistant United States Attorney for said Fourth Division; the defendant company being represented by its attorneys and counsel Messrs. McGowan & Clark. Whereupon the following proceedings were had and testimony was taken: [16]

[Proceedings Had August 19, 1911.]

Wharfage Case—No. 657.

Mr. McGOWAN.—We contend under the stipulation that we are conducting a warehouse in Dawson, Fairbanks and Chena for our own private use. At our wharf here, which has a warehouse upon it, it is used simply for the purpose of landing our own boats. We unload our own freight and freight for people for whom we carry it at that dock. The dock is not a public dock according to our contention or a wharf, in any sense of the word; that is our contention—it is simply a private wharf and private ware-

house, used for our private purpose and none other; that we do not permit other boats to land there. We have no wharfage charges, we have no dock, as a matter of fact because I do not think there is a dock in the interior of Alaska. We have a wharf and warehouse, but it is purely private, as we submit under the law and under the decisions; and in that connection we want at this time to call the Court's attention to the section, 460, covering general mercantile business of \$100,000 or over. Under that we pay a license, the largest license that is fixed by the law, and at this time I desire to introduce in evidence the licenses for the years 1905 and 1906, for the purpose of showing that we are conducting a general mercantile business and part of our general mercantile business is to bring our freight here, our goods here, that we have to store and sell during the year; and in connection with that business it is necessary for us to have a warehouse and landing place; that we have that wharfage and landing place at Chena and we also have a warehouse there for the purpose of convenience only—that is, [17] late in the season, the steamers cannot come up the slough. We then transfer our freight or our customer's freight from our steamboats to this warehouse, where it remains in our warehouse without charge of any kind until such time as we can deliver it over the railroad or in some other way. We offer these license receipts at this time.

Mr. CROSSLEY.—To which we object as incompetent, irrelevant and immaterial for the reason that it only covers a mercantile license, for their mercan-

tile business. This law covers the license fee or tax for public docks and wharves and warehouses and Mr. McGowan admits they are doing the business of a common carrier, and therefore it is not what could be really called a private dock, although owned by a private company, and that the license fee or tax for public docks and wharves is a separate license or fee from that of a mercantile establishment; and further that defendant has admitted, by stating that they used these docks as wharves for the loading and unloading of the freight which they carried for their customers, that is those who patronize the Northern Navigation Company or the Northern Commercial Company as carriers or shippers.

Objection overruled. Plaintiff allowed an exception.

Mr. McGOWAN.—We offer first the licenses for the year 1905 and then for 1906. They are admitted in evidence, marked Defendant's Exhibit Number 1 (Case Number 657), and Defendant's Exhibit Number 2 (Case Number 657), respectively, and read as follows:

**[Defendant's Exhibit No. 1—Case No. 657—
License.]**

“\$500.

Number 1325.

United States of America,
Territory of Alaska.

LICENSE FOR MERCANTILE. [18]

Received from Northern Commercial Company
the sum of FIVE HUNDRED DOLLARS. For

License for carrying on the business of Mercantile of \$100,000 per annum, at Fairbanks town, Territory of Alaska, Division Number 3, from the 15th day of June, 1905, to the 14th day of June, 1906.

Issued in compliance with the order of the District Court, Territory of Alaska, Third Division, duly made the 4th day of August, 1905.

[Seal] By EDWARD J. STIER,
Clerk of the District Court, Territory of Alaska,
Third Div.

By _____,
Deputy.

Dated at Fairbanks.”

**[Defendant's Exhibit No. 2—Case No. 657—
License.]**

“\$500.

No. 3014.

United States of America,
Territory of Alaska.

LICENSE FOR MERCANTILE.

Received from NORTHERN COMMERCIAL COMPANY the sum of FIVE HUNDRED DOLLARS.

For License for carrying on the business of Mercantile of \$100,000 per annum, at Fairbanks, town, Territory of Alaska, Division Number 3, from the 15th day of June, 1906, to the 14th day of June, 1907. Issued in compliance with the order of the District Court, Territory of Alaska, Third Division, duly

made the 4th day of August, 1906.

[Seal] By EDWARD J. STIER,
Clerk of the District Ct., Territory of Alaska,
Third Division.

By _____,
Deputy.

Dated at Fairbanks."

Mr. McGOWAN.—I will call Mr. Richmond.
[19]

[Testimony of Volney Richmond, for Defendant.]

VOLNEY RICHMOND, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. McGOWAN.)

Q. You are the manager of the Northern Commercial Company? A. Yes, sir.

Q. In the Tanana Valley? A. I am.

Q. Are you familiar with the warehouse maintained by the company in Chena? A. I am.

Q. What is the purpose of maintaining that warehouse?

A. Transferring the freight from the slough.

Q. Do you conduct a warehouse business down there? A. No, sir, we do not.

Q. Do you issue warehouse receipts?

A. No, sir.

Q. Did the company at any time conduct a general warehouse business or issue warehouse receipts?

A. Not in the valley.

Q. Have you a wharf at Chena?

(Testimony of Volney Richmond.)

A. We have a landing place, no wharf.

Q. Is there any building constructed on that wharf? A. None whatever.

Q. What do you use the wharf for?

A. Simply for the landing of the steamers.

Q. Do you permit other steamers to use that wharf?

A. They use that wharf—they use the waterfront.

Q. Do you charge them?

A. No charge of any kind.

Q. Coming to Fairbanks—have you a wharf or warehouse here? A. We have.

Q. Who constructed that wharf?

A. The N. C. Co.

Q. At their own expense?

A. At their own expense.

Q. And who is the owner of that wharf?

A. The Northern Commercial Company.

Q. What is that wharf for?

A. It is for the handling of freight,—transferring the freight from the steamers to the consignees and to our own house.

Q. Have you a warehouse on the wharf?

A. Yes, sir.

Q. Is there any charge made for warehouse on that wharf? A. None.

Q. In connection with the warehouse that you maintain, in connection with your plant, your various plants throughout Alaska, what are those warehouses used for?

(Testimony of Volney Richmond.)

A. The storage of our own supplies—the Northern Commercial Company goods.

Q. Why is it necessary to have a warehouse of that size?

A. On account of the short summer season and the long winters we have to do that to take care of the camps during the winter.

Q. The Northern Commercial Company has to maintain warehouses one of which is in this portion of Alaska, for that reason?

A. That is the reason.

Q. And that is the only reason they maintain it?

A. Yes, sir.

Q. The warehouses are separate from the docks and wharves? [21]

A. Yes, sir, they are separate from the dock and wharf.

Q. So you have at Chena and Fairbanks and other places on the rivers in Alaska these docks and wharves separate from your warehouses?

A. In Fairbanks, not in Chena—we have no wharf at Chena.

Q. You have at Fairbanks?

A. We have a wharf at Fairbanks.

Mr. McGOWAN.—That is all.

Cross-examination.

(By Mr. CROSSLEY.)

Q. That wharf or dock you use in transporting the goods that are shipped over the N. C. Company's lines or the N. N. Company's lines—which are one

(Testimony of Volney Richmond.)

and the same thing? A. We do, yes, sir.

Q. Is it not true that the cost of maintaining your public dock and wharf at Fairbanks is covered by charters which you make to those who ship over the N. C. Company or the N. N. Company lines?

Mr. McGOWAN.—We object to that.

Mr. CROSSLEY.—I withdraw the word “public.”

The WITNESS.—It is not, no, sir.

Q. How do you pay the cost of keeping up your dock and wharves at Fairbanks?

A. The same as any other expense.

Q. Out of company funds?

A. Out of company funds.

Q. The same as you do for maintaining the operation of a steamboat from here to St. Michaels?

A. Out of general funds.

Q. And there are a great many ships and a great many shippers [22] who ship their goods over your line of steamboats operating on the Tanana and Yukon Rivers in Alaska and those goods pass through your dock at Fairbanks and your wharf?

A. Yes, they pass through the wharf.

Q. Also you use this dock or wharf here at Fairbanks to maintain an office for those who desire passage—where passengers on the steamboats coming to or going from Fairbanks on the Tanana River and Yukon River purchase their tickets? A. Yes, sir.

Q. And where they have their baggage shipped from and to? A. We do.

Q. And also the freight that these shippers trans-

(Testimony of Volney Richmond.)

fer over your steamship lines in Alaska pass through this dock or wharf here at Fairbanks? A. It does.

Q. And pass through your wharf and dock at Chena?

A. We have no wharf at Chena; there is simply the warehouse that crosses the railroad—we have nothing on the waterfront.

Q. Nothing on the waterfront?

A. Nothing on the waterfront.

Q. I understood you to say that the Northern Commercial Company and the Northern Navigation Company are one and the same companies?

A. I didn't say so.

Q. Are the N. C. Company the owners or the N. N. Company?

A. That is something I couldn't tell you because I don't know.

Q. They own a majority of the stock?

A. The N. C. Company?

Q. Yes—in the N. N. Company?

A. That is something I don't know.

Mr. McGOWAN.—There are identically the same officials all the [23] way down, the same stockholders. The reason that is brought in the name of the Northern Commercial Company, in 1905 and 1906 they were operating under the name of the Northern Commercial Company alone, they were handling both steamers and freight, but since that, one handles the steamboats and the other the freight.

Mr. CROSSLEY.—Do you admit on behalf of the

(Testimony of Volney Richmond.)

defendant that their interests are one and the same and they are the same company practically for the purpose of this case?

Mr. McGOWAN.—Yes, for the purposes of this suit, yes, sir, and damages against them would be just the same as against the N. N. Company.

Q. The expense of handling the freight which you handle on the wharf is that not absorbed in the general expense of handling the freight over your lines?

A. How is that?

Q. The general expenses of handling the freight that your boats ship over your lines and deliver to you at your dock and wharf here at Fairbanks isn't that expense of maintaining the wharf and dock included within the expense of the cost of shipping the goods?

A. Not in the cost of shipping the goods but the cost of handling the goods at the dock.

Q. Not only at the dock but on the steamboat at the point where you deliver them?

A. No, it is not.

Q. Then you make a charge for handling at the dock?

A. The Longshoremen expense and the expense of maintaining the wharf.

Q. That is paid by the company? [24]

A. Yes, sir, by the company.

Q. Then it is absorbed in the general freight charges?

A. No, sir, it is not absorbed in the general freight charges.

(Testimony of Volney Richmond.)

Q. The shippers don't see any difference—they pay it in one bill, don't they?

A. The shipper pays the freight charges.

Q. And that is all he does pay?

A. That is all he does pay.

Q. Isn't that cost of maintaining your dock there or your wharf included in these freight charges, these longshoremen—don't you put that expense in?

A. We do not.

Q. Suppose a man ships from St. Michaels to Fairbanks and you charge him so much for shipping his goods up here and he pays you—when you are counting up what your costs are don't you count up also the longshoring cost here?

A. In counting the cost of operation we have to include the longshoring cost.

Q. You count that in the general freight cost?

A. In the general cost of operating the company.
(By Mr. McGOWAN.)

Q. The steamer "Schwatka" arrived three days ago with a barge—that freight was consigned to various customers or consignees? A. Probably was.

Q. Could those consignees go and get that freight at the wharf, the consigned freight for the stores at Fairbanks and take that freight off, without paying any charges, docking or wharfage, of any kind?

A. They could by paying the freight bills. [25]

Q. These freight rates are fixed in Seattle?

A. It is a tariff rate, published charge.

(By Mr. CROSSLEY.)

Q. What is your proportion of the business han-

(Testimony of Volney Richmond.)

dled by the steamship company, compared with your own business,—isn't the business carried on your steamers much greater than that of your own customers?

A. No, we handle the greater portion of it ourselves.

Q. Is it your answer to Mr. McGowan that you consider that you make a present to the shippers of this cost of maintaining the dock?

A. No, all transportation companies have to go to the expense of handling freight.

Q. Your company is a common carrier?

A. I presume they are.

Q. You are doing a common carrier's business of transporting freight and passengers on the rivers here in Alaska? A. They are.

(By the COURT.)

Q. Is this wharf here in Fairbanks built on your own ground or in the street?

A. It is built on the land in front of our town property on the waterfront. I couldn't answer whether it is Government domain or whether it belongs to the company.

Q. When a man has freight sent in here by you how long do you store it free of charge?

A. We are supposed to 24 hours, sometimes 48 and sometimes longer, and after that time it is transported to one of the storage warehouses in the town.

Q. Not one of your own? [26]

A. Not one of our own. We generally use what is known as the Tanana warehouse across the river.

(Testimony of Volney Richmond.)

Q. In Chena how do you land the freight and passengers?

A. They are landed there on the waterfront.

Q. Just put a gang-plank out on the dirt?

A. Yes, sir—just put a gang-plank out on the dirt.

Q. Nothing in the nature of a wharf?

A. Nothing in the nature of a wharf.

Q. There is nothing in the nature of an artificial landing or wharf there?

A. None whatever—the waterfront has been piled, partly by the people of the town and partly by people who own the ground, but simply more to protect the bank, not for dockage purposes.

(By Mr. CROSSLEY.)

Q. The Chena Slough here, on which Fairbanks is located, is a navigable stream for steamboats operating in Alaska? A. It is supposed to be, yes, sir.

Q. And the dock that you have there and wharf is built right on and into the edge of the river?

A. On the water's edge, yes, sir.

Q. Do you understand it is on the Government property there—that 60 feet belongs to the Government?

A. That is a question I have heard thrashed out so many times I don't know how to answer it—I don't know.

(By Mr. McGOWAN.)

Q. Is there a street between the store and wharf and a street each end of the wharf? A. Yes, sir.

[27]

Q. How wide are the streets?

(Testimony of Volney Richmond.)

A. That street is probably in the neighborhood of 60 or 70 feet wide.

Q. Do you know how it came to acquire that waterfront?

A. I suppose through the trading-post site.

Q. From whom?

A. From E. T. Barnette, from the Government.

Q. Wasn't that acquired from the deed executed by the Government and Captain Barnette by which the rights of all parties were adjusted?

A. It was.

Mr. McGOWAN.—I believe that is on record.

Q. The courthouse, all of this property, was the Barnette trading-post—that is right, is it not, and it was laid out in that way?

Mr. CROSSLEY.—It was divided up into city lots.

Mr. McGOWAN.—Before it was divided up into city lots it was a trading-post, Judge Wickersham was one of the parties acting for the Government and that property was acquired according to that deed?

The WITNESS.—Yes, sir.

Mr. CROSSLEY.—We object to this as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

Q. The city of Fairbanks is an incorporated town?

A. It is.

Mr. CLARK.—I desire to call the Court's attention at this time to the last part of Section 26, Part 3 of Carter's Codes of Alaska, page 140, in which it says, after describing the laws relating to mining claims, it says—that the [28] reservation of a

roadway sixty feet wide, under the tenth section of the Act of May 14, 1898, entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes" shall not apply to mineral lands or townsites.

Mr. McGOWAN.—The trading site was before the town was incorporated, but when the city of Fairbanks was incorporated, they took over the trading site and it was absorbed in the incorporated town. Captain Barnette staked what he called a trading-post. He then quitclaimed to various people, including the United States Government and this very land that this courthouse is on, condemnation was placed on record for this, fixing the width of the streets, and the courthouse site and all this ground was taken in and made a part of the incorporated town of Fairbanks. That being so and we being in possession of this waterfront at the time the town was incorporated, we have held title and held it by virtue of that possession.

Judge OVERFIELD.—Have you a deed from the townsite?

Mr. McGOWAN.—Yes, sir, we have a deed from the townsite.

Mr. BROWN.—These deeds were subsequent to the imposition of this license tax.

Mr. CROSSLEY.—Our contention is that all these deeds they now have to this property were issued subsequent to this action.

Witness excused.

Mr. McGOWAN.—We will call Mr. Heilig. [29]

[Testimony of A. R. Heilig, for Defendant.]

A. R. HEILIG, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. McGOWAN.)

Q. You incorporated the city of Fairbanks, did you not, or participated in the incorporation of it?

A. Well, I was clerk of the court at the time it was incorporated and of course am familiar with the proceedings, because they passed through my hands. I issued all the notices and prepared the orders of the Court, which are a matter of record, entries incorporating the town and defining its limits.

Mr. CROSSLEY.—We object to that answer as incompetent, irrelevant and immaterial and as not the best evidence.

Objection overruled. Plaintiff excepts.

Q. Explain in your own way the manner in which the town was incorporated and whether or not the townsite took in the ground involved in this present controversy.

A. The town was incorporated according to the provisions of our statute. It embraced, to my certain knowledge, because I have been around the boundaries, the tract of land now occupied by the N. C. stores, warehouses and wharves. Subsequently I secured another employment from the city council; after they were incorporated I was appointed townsite agent and procured for them a survey of the out-boundaries of the town of Fairbanks for the purpose of purchasing it from the government and procuring

(Testimony of A. R. Heilig.)

a patent. I then again familiarized with the tract of land which we sought to purchase and procured a survey of the outboundaries to be made by a surveyor appointed by the Surveyor-general of Alaska. That again included all of the land covered by [30] the stores and warehouse and wharves of the Commercial Company. I then procured the appointment of a townsite trustee, Henry T. Ray, and attended to the proceedings, making entry and application for the purchase of the land for townsite purposes, all of which was done and the patent was issued to Mr. Ray from the Government, covering all of the land embraced within the official boundaries surveyed for patent. That patent also embraced the land of the Northern Commercial Company and its warehouse and the wharves. In that connection, as attorney for the townsite trustee, it became important as I thought for me to ascertain whether the so-called Barnette Trading Post had ever been perfected, because there were rights which might conflict with the townsite trustee's application to enter, which should be investigated. I satisfied myself that all pretense of claiming under the trading site had been abandoned; in other words, it had never been perfected and was practically forgotten. And I satisfied myself too from the agents of the Northern Commercial Company here that they chose to take their title from the townsite trustee under the patent received by him, and that is about as far as I personally know.

Q. The deeds were drawn, were they not, and delivered?

that is no dock or wharf fee?

Mr. McGOWAN.—Yes, sir, we have submitted a statement of that.

Mr. CROSSLEY.—And you didn't pay any such fee, dock fee or wharf fee, in any other part of Alaska?

Mr. McGOWAN.—No, sir, and we contend we don't have to.

(After argument.)

By the COURT.—The second matter, regarding the wharf, Judge Overfield and I desire to confer about that. Regarding the other matter neither of us has any doubt that the vessels are liable to that tax and as far as I am concerned, and I think Judge Overfield, the position of Mr. Crossley regarding "elsewhere" means elsewhere within the jurisdiction. If there is any difficulty about the interpretation [33] of that statute, I think it has been occasioned by the fact that counsel have followed the Carter's Code in quoting the law in their agreed statement. The official publication shows that word "a" to be "or." That would show that a vessel registered in Alaska, as these vessels are, is liable; that those vessels that run to southeastern Alaska and Southwestern, with headquarters in Seattle and registered there, that unless they paid the license or tax on their vessels, on their transportation line in the State of Washington, or Oregon, or California, then they would be liable here although they were registered there.

I will entertain a motion by counsel to change that word "a" to "or."

Mr. McGOWAN.—We consent to that—there is no question about that.

By the COURT.—With that stipulation that may be changed.

Mr. CROSSLEY.—The word “or” instead of “a”?

By the COURT.—Yes, sir.

Mr. CROSSLEY.—The Government makes the motion to make that change.

Motion granted. [34]

That after said testimony was closed, argument was made by the counsel for the respective parties, after which the Court took the matter under advisement.

That thereafter, and on the 24th day of August, 1911, the Court, by consent of counsel for plaintiff and defendant, made and entered an order in the words and figures as follows, to wit:

[Title of Court and Cause.]

**Order [Directing That Original Statement of Facts
be Supplemented, etc.].**

The above-entitled action having come on for trial before the Court, and the Court having given its ruling upon the construction of the statute in controversy, whereby it ruled that the defendant is liable for the payment of a license fee or a tax of 10 cts per ton on freight handled on its wharf at Fairbanks, Alaska, consigned and belonging to persons or corporations other than the defendant herein, and it appearing to the Court that this action has been pending since the year 1906, and that in the interim defendant has not paid the said license fee

or tax upon the freight handled by it upon its wharf during each year, and for the purpose of avoiding multiplicity of actions and settling all differences between the parties to this action, in relation to the controversy herein, and so that the rights of the respective parties may be fully adjudicated up to the year 1911—the defendant having announced that he intends to appeal from the ruling of this Court aforesaid—and for the purpose of having all matters in controversy between said parties up to the present year made a part of the record herein, so that the same may be fully considered on appeal, and the attorneys for the respective parties having consented to the making of this order,

IT IS HEREBY ORDERED, that the original Statement of Facts filed herein be supplemented by [35] adding thereto the supplemental paragraph hereunto annexed, marked paragraph “XVI,” and that said paragraph shall be considered as a part, and portion of the original Statement of Facts filed in the above entitled action; and

IT IS FURTHER ORDERED that said original Statement of Facts need not be engrossed, and that this paragraph shall be considered as a part thereof, the verification of the same having been waived, and that the Clerk of the Court shall attach the same, together with this order to the original Statement of Fact filed in this action; and

IT IS FURTHER ORDERED that said Supplemental Paragraph be filed herein *nunc pro tunc* as

of the 18th day of August, 1911.

EDWARD E. CUSHMAN,
PETER D. OVERFIELD,

Judges.

Dated August 24th, 1911. [36]

[Title of Court and Cause.]

Supplemental Statement of Facts.

Insert on page five (5) of original Statement of Facts and Submission Without Action, after paragraph XV, the following:

XVI.

That since the filing of the original Statement of Facts in this action and during the years 1907, 1908, 1909, 1910 and 1911, Defendant has been conducting a wharf in Fairbanks, in the same manner as set forth in the original statement of facts herein, and in connection with these years it is consented that the Court in determining this action, shall determine whether or not the said Defendant is liable to pay a license tax or fee on the amount of freight handled upon its wharf at Fairbanks, belonging, consigned to, or consigned by persons or corporations other than the defendant herein, during said years, and the amount thereof; that is to say, that the Court shall have jurisdiction in the present action to determine the controversy between the parties Plaintiff and Defendant from the year 1905 down to and including the year 1911.

Dated August 24, 1911.

McGOWAN & CLARK,
Attorneys for Defendant.

The foregoing Supplement and Order are hereby consented to.

JAMES J. CROSSLEY,
Attorney for Plaintiff.
McGOWAN & CLARK,
Attorneys for Defendant.

Filed in the District Court, Territory of Alaska, 4th Div. Aug. 24, 1911. C. C. Page, Clerk. By G. F. Gates, Deputy. *Nunc pro tunc* as of Aug. 18, 1911.

(Foregoing Order of Aug. 24, 1911, with Supplemental Statement of Facts attached, is endorsed: Filed in the District Court, Territory of Alaska, 4th Div. Aug. 24, 1911. C. C. Page, Clerk. By G. F. Gates, Deputy.) [37]

That thereafter, and on the 24th day of August, 1911, the Court made and entered its interlocutory order, which was as follows:

[Title of Court and Cause.]

Order [That Northern Commercial Co. is Liable for License Tax; Directing Filing of Amended Statement of Agreed Facts, etc.].

This cause having come on for trial on the 19th day of August, 1911, before the Honorable Edward E. Cushman, Judge of the District Court for the Third Judicial Division of the Territory of Alaska, and the Honorable Peter D. Overfield, Judge of the District Court for the Fourth Judicial Division of the Territory of Alaska, the plaintiff appearing by James J. Crossley, United States Attorney, and John K. Brown, Assistant United States Attorney,

and defendant appearing by Messrs. McGowan & Clark, its attorneys, and a jury trial having been expressly waived by the respective parties hereto in open court, and the Court having heard all the evidence of the respective parties bearing upon the question of the liability of the defendant to pay a license tax to the plaintiff of ten cents (10¢) per ton on freight handled on its wharf at Fairbanks, Alaska, as provided by section 460 of the Act of Congress, entitled "An Act to define and punish crime in the District of Alaska and to provide a Code of Criminal Procedure for said District," approved March 3, 1899, as amended by section 29, Title I of the Act of Congress entitled "An Act making further provision for a Civil Government for Alaska, and for other purposes," approved June 6, 1900; and the Court having on said day ruled and held that the defendant is liable for the payment of such license tax upon the freight handled on its said wharf at Fairbanks, Alaska, consigned and belonging to persons or corporations other than the defendant herein; and it further appearing that it is advisable that all the matters of difference between the plaintiff and the defendant arising out of the non-payment of said license tax for the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911, be adjudicated in this action, and that the agreed statement of facts herein be amended accordingly [38] and filed *nunc pro tunc* as of the 18th day of August, 1911, and that further evidence will be necessary in order to show the amount of said license tax on the number of tons of freight belonging or consigned to or by

persons or corporations other than the defendant herein, for the several years mentioned in said amended and agreed statement of facts herein, and that such further evidence herein may be taken before a Referee and reported to this Court and James J. Crossley, Esq., United States Attorney for the Fourth Judicial Division of the Territory of Alaska on behalf of the United States, and Messrs. McGowan & Clark, attorneys for the defendant and on behalf of defendant, appearing this day in open Court, and consenting and agreeing to the entry of this order and to each and every one of its terms and conditions, save and except that counsel for defendant object to the Court as to any liability on its part for any license tax whatsoever, and except thereto.

NOW, THEREFORE, IT IS ORDERED, that the defendant, the Northern Commercial Company, a corporation, is liable to pay to the United States a license tax of ten cents (10¢) per ton, per annum, for the years 1905 to 1911, both inclusive, on the amount of freight handled upon its said wharf at Fairbanks, Alaska, belonging, consigned to, or consigned by persons or corporations other than the defendant herein.

IT IS FURTHER ORDERED that an amended statement of agreed facts be filed herein *nunc pro tunc* as of the 18th day of August, 1911, containing a statement of the facts in controversy between the parties hereto as to such license tax on the amount of freight handled on its said wharf at Fairbanks, Alaska, belonging or consigned to or consigned by persons or corporations other than the defendant

herein, for the years 1905 to 1911, both inclusive instead of for the years 1905 and 1906, and that when judgment shall be entered herein, such judgment shall be for the whole amount of said license tax for the years 1905 to 1911, both inclusive; and it is further ordered that Guy B. Erwin, Esq., an attorney of this Court, be and he is hereby appointed as Referee herein to take and report the above evidence and he is hereby ordered to proceed to hear proofs and take testimony as to any and all matters and things involving or respecting the amount of such license tax for said years, and that such Referee report said testimony to this [39] Court on or before the 31st day of March, 1912, and that such Referee be paid for his compensation the sum of \$15.00 per day for each and every day necessarily spent by him in the performance of his duties as such Referee and \$7.50 a day for any fraction of a day so spent, besides \$1.00 per page for a transcript of the testimony, exclusive of any original exhibits thereto attached, and that such compensation shall become a part of the costs in this case and may be taxed by the prevailing party, if paid by it, against the losing party as a portion of its taxable costs and disbursements in this action.

It is further ordered that either of the Judges above named, or any Judge of the District Court of the Territory of Alaska, having or exercising jurisdiction within the Fourth Judicial Division of said Territory may make, enter and sign any order hereinafter made and entered in this cause or any judgment herein.

It is further ordered that this cause be and it is hereby continued for further hearing until after the filing by the above-named Referee of his report of the testimony taken by him herein, as herein provided, each of the parties hereto consenting and agreeing in open Court that such continuance shall in no wise affect the jurisdiction of this Court to proceed further in the case upon the coming in and filing of said Referee's report.

Done in open court this 24th day of August, 1911.

PETER D. OVERFIELD,

EDWARD E. CUSHMAN,

District Judges.

Entered in Court Journal No. 11, page 391.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div., Aug. 24, 1911. C. C. Page, Clerk. By H. C. Green, Deputy.

To a portion of which interlocutory order and judgment defendant excepted and presented and had allowed a Bill of Exceptions, which was in the words and figures as follows: [40]

[Title of Court and Cause.]

Bill of Exceptions [to Interlocutory Order].

BE IT REMEMBERED that on the 24th day of August, 1911, during the trial of the above-entitled action the Court made and filed its order, wherein it ruled and held that the defendant is liable for the payment of such license tax upon the freight handled upon its said wharf at Fairbanks, Alaska, consigned and belonging to persons or corporations other than

the defendant herein, and ordered:

“That the defendant, the Northern Commercial Company, a corporation, is liable to pay to the United States a license tax of ten cents (10¢) per ton, per annum, for the years 1905 to 1911, both inclusive, on the amount of freight handled upon its said wharf at Fairbanks, Alaska, belonging, consigned to, or consigned by persons or corporations other than the defendant herein.”

To which ruling and the part of said order above specified the defendant then and there excepted, and does now except to the same, and assigns the same as error.

McGOWAN & CLARK,
Attorneys for Defendant.

Dated August 24, 1911.

ORDER.

The above exception is hereby allowed and the foregoing Bill of Exceptions is hereby settled and allowed.

Done in open court this 24th day of August, 1911.

PETER D. OVERFIELD,
EDWARD E. CUSHMAN,

Judges.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div., Aug. 24, 1911. C. C. Page, Clerk. By G. F. Gates, Deputy. [41]

That thereafter such proceedings were had that the matter came on regularly for hearing before the Honorable Guy B. Erwin, the referee appointed by

this Court, on the 1st day of February, 1912, at the hour of 11 o'clock in the forenoon, at the office of said referee in the Red Cross Building, in the town of Fairbanks, pursuant to the notice of hearing issued and served on the attorneys for the respective parties by the Referee on the 20th day of January, 1912; Honorable James J. Crossley, and the Honorable John K. Brown, appeared for the United States, and John A. Clark, Esq., appeared for the defendant; at which hearing and subsequent hearings, the following proceedings were had and testimony was taken. [42]

[Title of Court and Cause.]

**Report of Proceedings and Testimony Before
Referee.**

This matter came on before the Referee on the 1st day of February, 1912, at the hour of 11 o'clock in the forenoon, at his office in the Red Cross Building, pursuant to the Notice of Hearing issued and served on attorneys for the parties by Referee on the 20th day of January, 1912, J. J. Crossley and J. K. Brown appearing for the United States, and John A. Clark appearing for the defendant.

Hearing continued on motion of attorney for defendant until 2 o'clock P. M.

The parties appeared by their attorneys, aforesaid, at 2 o'clock P. M. on the 1st day of February, and defendant files a petition for continuance to the 20th day of February, 1912, at 2 o'clock P. M. Continuance granted until February 5th, 1912.

On February 5th, 1912, the parties by their respec-

tive attorneys aforesaid appeared, and at the request of attorney for defendant, the matter was continued until February 6th, 1912.

On February 6th, 1912, the parties appeared before the referee by their attorneys above named, and on motion of attorney for the defendant and by consent, the matter was continued until the 20th day of February, 1912.

On February 20th, 1912, the matter was continued by consent of attorneys until March 15th, 1912.

On March 15th, 1912, the parties appeared by their attorneys aforesaid, and the following proceedings were had: [43]

By Mr. CLARK.—I now offer for the inspection of the referee, and as evidence to be hereafter sworn to by Mr. Richmond or Mr. McGowan immediately upon their arrival from San Francisco, or by Mr. J. R. Fowle, if he can secure the necessary data from his office to enable him to swear to same, a tabulated list containing a statement of the freight handled over the Northern Commercial Company's dock at Fairbanks, Alaska, for the seasons 1905 to 1911, inclusive, save and except the freight to Fairbanks from points other than Dawson and St. Michael for the year 1905, and freight billed outward from Fairbanks in the year 1905. This offer to be made at this time for the purpose of enabling the referee to prepare a general form of report subject to such examination, direct and cross, as may be deemed advisable to be had from Mr. Richmond, Mr. McGowan or Mr. Fowle, when said witnesses are sworn to testify in said matter.

Mr. CROSSLEY.—To which we object as incompetent, irrelevant and immaterial, for the reason that the same is not properly identified or sworn to by witnesses competent to testify to the same, there being no witness present to identify and swear to the same.

By REFEREE.—Statement accepted for the purpose mentioned in offer of defendant.

Mr. CROSSLEY.—On behalf of the Government we have no objection that the referee shall have these papers for the purpose of familiarizing himself with the situation in order to formulate his report when the same is properly submitted as evidence.

Hearing continued by consent until 22d March, 1912, at 2 o'clock P. M.

On 22d March, 1912, at request of defendant and by consent hearing continued until March 25th, 1912, at 2 P. M. [44]

On 25th March, hearing continued until April 1st, 1912, at 2 P. M. by consent of parties.

On April 1st, 1912, by agreement of counsel, hearing continued to await the arrival in Fairbanks of Volney Richmond, superintendent of the defendant corporation, and Thomas A. McGowan, one of its attorneys.

On May 8th, 1912, at 2 o'clock P. M. the parties appeared before the referee, Mr. J. K. Brown appearing for plaintiff, and Mr. Thomas A. McGowan appearing for defendant, and the following proceedings were had:

**[Testimony of Volney Richmond, for Defendant,
Taken Before Referee.]**

VOLNEY RICHMOND, a witness produced by and on behalf of the defendant, being first duly sworn by the Referee, testified as follows:

(By Mr. McGOWAN.)

Q. You are superintendent of the Northern Commercial Company? A. I am.

Q. And familiar with the dock opposite the plant in the city of Fairbanks? A. I am.

Q. I hand you a statement showing the tonnage handled over this dock between the years 1905 and 1911, inclusive. Where was that statement prepared? A. In San Francisco, California.

Q. Under the supervision of myself?

A. It was.

Q. And it is an extract from the records of our home office? A. It is.

Mr. McGOWAN.—We now offer this statement in evidence.

Q. (Mr. BROWN.) Did you verify this Mr. Richmond from the books?

A. I did not check it. It was made up by one of the office force and compared.

Q. You have no personal knowledge of the correctness of the books from which this was taken?

[45]

A. No, I am not a bookkeeper.

By Mr. McGOWAN.—But you have personal knowledge of the freight handled at Fairbanks during those years?

(Testimony of Volney Richmond.)

A. I have personal knowledge of it in an approximate way.

Q. And approximately, from your personal knowledge, are those figures correct? A. It is correct.
(By Mr. BROWN.)

Q. But what does this cover, Mr. Richmond, does it cover any of the freight or cargo consigned to the Northern Commercial Company, or merely other parties than the Northern Commercial Company?

A. This is freight other than the Northern Commercial Company freight.

Q. Now, I will ask you if the Northern Commercial Company does not receive considerable freight at Fairbanks which is really consigned in the name of the Northern Commercial Company for other parties. A. They do not—none whatever.

Q. So this statement represents the number of tons of freight billed into Fairbanks to other parties than the Northern Commercial Company and received over the Northern Commercial Company's wharf? A. It does.

Q. And also freight billed from Fairbanks to other points and handled over the Northern Commercial Company's wharf at Fairbanks not belonging to the Northern Commercial Company? A. It does.

Q. You have every reason to suppose that this is correct?

A. I am practically absolutely sure it is. It was made by the head accountant of the Northern Navigation Company.

Q. And this is a correct abstract of the books of

(Testimony of Volney Richmond.)
the Northern Commercial Company?

A. It is, of the Northern Commercial Company
and the Northern Navigation Company.

Q. The Northern Commercial Company has been
the owner of that dock from 1905 to 1911.

A. They have. [46]

Mr. McGOWAN.—We now offer in evidence, and
ask that it be marked “Defendant’s Referee Exhibit
No. 1.”

(Statement accepted and marked by Referee.)
[47]

Defendant's Referee Exhibit No. 1.**STATEMENT OF OUTSIDE FREIGHT HANDLED OVER NORTHERN COMMERCIAL CO. DOCK.**

Fairbanks. Seasons 1905-1911 Inclusive.

Season.	Billed from St. Michael, Tons.	Billed from Dawson, Tons.	Billed from all other points. Tons.	Billed from Fairbanks, Tons.	Total Tons.
1905	1571.42	2107.73	#	#	3679.15
1906	2475.58				
	Landed at Chena				
	302.00				
	2173.58	2442.92	102.10	231.12	4949.72
1907	1886.00				
	do. 202.00				
	1684.00	358.81	36.64	315.88	2395.33
1908	913.88				
	" 42.00				
	871.88	195.40	46.94	495.66	1609.88
1909	5975.46				
	" 1530.75				
	4444.71	238.00	70.85	610.18	5363.74
1910	1044.24				
	" 193.35				
	850.89	137.03	41.85	1220.94	2250.71
1911	1071.39				
	" 364.11				
	707.28	157.78	62.81	423.02	1350.89
Total	12303.76	5637.67	361.19	3296.80	21599.42

#— No report of local freight inward or outward from Fairbanks season 1905; figures will have to be obtained, from Fairbanks Office.

Home Office records for season 1905 were destroyed by fire.

San Francisco, Feb. 15th, 1912.

(Testimony of Volney Richmond.)

(By Mr. McGOWAN.)

Q. Mr. Richmond, during the season of 1905 it appears on this exhibit, "Defendant's Referee Exhibit No. 1," under the heading "Billed from all other points Tons" blank, "Billed from Fairbanks Tons" blank. Explain, if you please, why those figures are not contained in that exhibit.

A. All the records of the Northern Commercial Company were destroyed in the earthquake of 1905 at San Francisco, and all the records showing the amount of freight handled by the Northern Commercial Company over the dock in Fairbanks in the year 1905 were destroyed by the flood in the spring of 1911 at Fairbanks, the records being on the dock. The balance of the statement is correct.

Q. And for that reason the company were unable to obtain the records for that year showing freight billed from other points and freight billed from Fairbanks? A. They were.

Q. Now, then, Mr. Richmond, you arrived in Fairbanks at what time?

A. On the 15th day of March, 1905.

Q. Then you were here yourself during the summer of 1905? A. I was.

Q. In looking over the list under those two heads "Billed from all other points" and "Billed from Fairbanks" during that year, can you tell approximately how many tons of freight you in your judgment would deem as having been handled under the two blank heads, approximating from the freight handled in other years?

(Testimony of Volney Richmond.)

A. To make it liberal, billed from all other points in 1905 would not exceed 100 tons. Billed from Fairbanks in 1905 the limit would be 300 tons.

By Mr. BROWN.—It is hereby consented by counsel for the Government that the blank spaces left opposite the season 1905 and under the heading “Billed from all other points—tons” be filled in with the figures “100,” and that for the same year that the blank space under the heading “Billed from Fairbanks Tons” be filled in with the [49] figures “300,” indicating respectively 100 and 300 tons, and that the 400 tons so added be added to the total of 21,599.42 tons as shown on the exhibit.

(By Mr. McGOWAN.)

Q. The figures in red ink as shown on the exhibit just offered indicate what?

A. The freight that was billed and delivered at Chena, Alaska, and did not come over the Fairbanks dock.

Q. It was landed at Chena as indicated on the exhibit? A. Yes, sir.

By Mr. BROWN.—No cross-examination.

That the testimony was then closed and the matter submitted to said Referee for his findings and decision, and thereafter and on or about the 15th day of May, 1912, said Referee, in pursuance to an Order of Court heretofore referred to, submitted to the above-entitled court his Report and Findings, which was as follows, to wit:

[Title of Court and Cause.]

Report of Referee.

Pursuant to an order of this Court in this action, made on the 24th day of August, 1911, by Peter D. Overfield and Edward E. Cushman, District Judges, appointing the undersigned, Guy B. Erwin, Referee, to hear proofs and take testimony as to any and all matters and things involving or respecting the amount of license tax due by defendant to the United States of America for freight handled over defendant's wharf at Fairbanks, Alaska, during the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911, inclusive, I, the undersigned Referee, beg leave to report as follows: [50]

I.

That I have been attended by attorneys for the respective parties, the United States of America appearing by J. J. Crossley, U. S. District Attorney, and John K. Brown, Asst. U. S. District Attorney, and the defendant appearing by its attorneys, Messrs. McGowan & Clark, and I proceeded to a hearing of the matter so referred.

II.

I further report that on such hearing Defendant's Referee, Exhibit No. 1, being a statement of Outside Freight handled over Northern Commercial Company's dock, was offered by defendant's attorneys, accepted by me and filed as such, and that Mr. Volney Richmond, a witness produced by defendant, was sworn by me and testified in said matter, and a transcript of his testimony, together with a record of all

proceedings, and said exhibit are herewith filed with the Clerk of said Court as a part of this report.

III.

That after a full examination and consideration of said matter I find as follows:

(1) That during the year 1905, the Northern Commercial Company handled over its dock at Fairbanks, Alaska, 4079.15 tons, upon which it became liable to pay to the United States of America a license tax of ten cents per ton, amounting to \$407.915.

(2) That during the year 1906, the Northern Commercial Company handled over its dock at Fairbanks, Alaska, 4949.72 tons, upon which it became liable to pay to the United States of America a license tax of ten cents per ton, amounting to \$494.972.

(3) That during the year 1907, the Northern Commercial Company handled over its dock at Fairbanks, Alaska, 2395.33 tons, upon which it became liable to pay to the United States of America a license tax of ten cents per ton, amounting to \$239.533.

(4) That during the year 1908, the Northern Commercial Company handled over its dock at Fairbanks, Alaska, 1609.88 tons, upon [51] which it became liable to pay to the United States of America a license tax of ten cents per ton, amounting to \$160.988.

(5) That during the year 1909, the Northern Commercial Company handled over its dock at Fairbanks, Alaska, 5,363.74 tons, upon which it became liable to pay to the United States of America a

license tax of ten cents per ton, amounting to \$536.-374.

(6) That during the year 1910, the Northern Commercial Company handled over its dock at Fairbanks, Alaska, 2250.71 tons, upon which it became liable to pay to the United States of America, a license tax of ten cents per ton, amounting to \$225.-071.

(7) That during the year 1911, the Northern Commercial Company handled over its dock at Fairbanks, Alaska, 1350.89 tons, upon which it became liable to pay to the United States of America a license tax of ten cents per ton, amounting to \$135.089.

IV.

That said Northern Commercial Company is liable to pay to the United States of America License Tax on the total amount of freight handled upon its wharf at Fairbanks, Alaska, for the years 1905, 1906, 1907, 1908, 1909, 1910, and 1911, inclusive; belonging, consigned to or consigned by persons or corporations other than the defendant herein, on 21,999.42 tons at the rate of ten cents per ton amounting in the aggregate, to Two Thousand One Hundred Ninety-nine Dollars and Ninety-four cents (\$2,199.94).

Dated the 15th day of May, A. D. 1912.

GUY B. ERWIN,
Referee.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 16, 1912. C. C. Page, Clerk. By H. C. Green, Deputy.

That thereafter and on or about the 31st day of May, 1912, defendant herein served and filed its mo-

tion to set aside the Report of the Referee, and objections to his findings, which were as follows, to wit:
[52]

[Title of Court and Cause.]

Motion to Set Aside Report of Referee.

Now comes the defendant above named and moves the Court to set aside the report, and the findings of fact and conclusions of law set forth therein, and each and all thereof, made by Guy B. Erwin, the Referee heretofore appointed herein, and objects to the adoption thereof, on the following grounds, to wit:

I.

That the findings numbered 1 to 7, inclusive, as set forth in paragraph III of said Referee's report, are not sustained by the evidence and are contrary thereto in the following particulars, to wit:

(a) That the evidence as heretofore taken before the Court and the Referee, fails to show that the defendant was prosecuting, or attempting to prosecute the business of conducting "public docks, wharves, and warehouses," where it handled or stored goods.

(b) That the evidence shows that the defendant owned a dock or wharf at Fairbanks, Alaska, on which was constructed a shed, and that the same was used for its private use only; and that it made no dock, wharf, or warehouse charges of any kind for goods handled or landed over said wharf or dock.

(c) That it appears from the uncontradicted evidence given at the trial that the defendant maintained said dock or wharf and shed for its own exclusive use, and not for the use of the public or others.

(d) That the evidence introduced at the trial and

before the Referee shows that no charge of any kind, either wharf, dock, or warehouse, was made by the defendant on the tonnage set forth [53] in the findings of the Referee aforesaid.

(e) That the evidence introduced before the Court and the Referee fails to show that the defendant maintained or prosecuted or attempted to maintain or prosecute, the business of conducting public docks, wharves, or warehouses, at the town of Fairbanks aforesaid, but, on the contrary, the evidence shows that the docks, wharves, and warehouses conducted by defendant were private docks, wharves, and warehouses, maintained and conducted by it for the purpose of facilitating the handling of its own freight, and that, where freight which belonged to persons other than defendant was handled thereon, the same was handled without charge of any kind.

(f) That the evidence shows that the defendant did not permit steamboats other than those delivering, freight to itself to land at or use the docks, wharves, and warehouses aforesaid, and that it maintained said docks, wharves, and warehouses for its own private use.

II.

That paragraph IV of said Report is not sustained by the evidence and is contrary thereto, for the reason that it appears from the evidence that no charge was made by defendant for handling the freight set forth in said finding, and that it permitted the landing of said freight at its wharf at Fairbanks simply for the purpose of accommodating the persons and firms to whom said freight was consigned.

III.

That defendant now moves this Court to set aside findings 3 and 4 of said Referee and to refuse to adopt the same, on the ground that each, every and all of said findings are contrary to the evidence in the case, for the reasons hereinbefore set out.

IV.

Defendant further objects to the report of said Referee, and all thereof, excepting the transcript of testimony filed by him, [54] on the ground that the order appointing said Referee did not authorize the Referee to make findings of fact and conclusions of law, but simply provided that the Referee proceed to hear proofs, and take testimony and report the same to the Court, so that the Court could find thereon, and defendant does now move to set aside all the findings made by said Referee wherein he finds upon the facts and the law.

V.

Defendant excepts to findings numbered 1 to 7, inclusive, as set forth in paragraph III of said Referee's report, and to each and all thereof, on the ground that the same are not authorized by the order of reference in this matter.

VI.

Defendant excepts to paragraph IV of said Referee's report, and the whole thereof, on the ground that the same is not authorized by the order of reference in this matter.

VII.

Defendant now moves that all parts of the report of said Referee, finding on facts and establishing

conclusions of law be set aside, and that the Court consider only that part of said Referee's report wherein he sets forth the testimony as taken before him.

Dated at Fairbanks, Alaska, this thirty-first day of May, A. D. one thousand nine hundred twelve.

McGOWAN & CLARK,

Attorneys for Defendant.

Service of the within Motion to set aside Report of Referee and receipt of a copy thereof acknowledged this 31st day of May, 1912.

JAMES J. CROSSLEY,

U. S. District Attorney,

Attorney for Plaintiff.

[Endorsed]: No. 657. (Title of Court and Cause.) Motion to Set Aside Report of Referee. Filed in the District Court, Territory of Alaska, 4th Div. May 31, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [55]

That thereafter and on the 1st day of June, 1912, the plaintiff duly filed its motion to confirm the Referee's report and for judgment thereon, which motion is in the words and figures as follows, to wit:

[Title of Court and Cause.]

**Motion to Confirm Referee's Report and for
Judgment Thereon.**

Now comes the above-named plaintiff by James J. Crossley, Esq., United States Attorney for the Fourth Judicial Division of the Territory of Alaska, and John K. Brown, Esq., Assistant United States Attorney, and moves this Honorable Court that the report of the Referee, Guy B. Erwin, Esq., filed

herein on the 16th day of May, 1912, be in all respects approved and confirmed, and that judgment be entered upon said report of said Referee in favor of the above-named plaintiff and against the above-named defendant for the sum found by the said Referee in his said report to be due from the said defendant to the said plaintiff for the license tax or fee of ten cents (10¢) per ton upon the freight handled upon the public wharf of the defendant Northern Commercial Company at Fairbanks, Alaska, during the years 1905 to 1911, inclusive, amounting in all to the sum of \$2,199.94, together with the costs and disbursements of this action.

This motion is based upon said report of the said Referee and all the records, proceedings and files in the above-entitled action.

JAMES J. CROSSLEY,

United States Attorney.

JOHN K. BROWN,

Assistant United States Attorney.

[Endorsed]: No. 657. Title of Court and Cause.
Filed June 1, 1912. [56]

That thereafter and on the 1st day of June, 1912, the motion of the defendant to set aside the Report of the Referee herein came on regularly for hearing before Honorable Peter D. Overfield, when James J. Crossley, United States District Attorney, and John K. Brown, Assistant United States Attorney, appeared for and on behalf of the plaintiff, and Thomas A. McGowan, Esq., appeared for and on behalf of the defendant, when the following proceedings were had:

[Exceptions to Findings of Referee, etc.]

Mr. McGOWAN.—In this case, if your Honor please, we except to the findings of the Referee. This is the same question over again that we argued before the Court about the first suit. We also make the same objection to the Referee's findings: that the order of reference did not authorize the Referee to make findings of fact and conclusions of law. The findings of fact, if made at all, should be made by the Court, and upon that understanding case 657 is submitted.

COURT.—No doubt but what your reading of the order as to making findings is correct, but I shall at least overlook the formality, and after I have disposed of this other matter, I shall no doubt adopt his findings as my findings.

Mr. McGOWAN.—I shall state as to that, your Honor, that the District Attorney had prepared a judgment, and we had agreed to the form, so as to save the Court trouble. We reserved our exception to the substance, but waived objection as to form. And so as to have these as the findings of the Court, in order that when this case goes before the Circuit Court of Appeals, we can say that these are the findings of the Court and not of the Referee.

COURT.—There is no question about that, as in divorce proceedings, where the Referee submits findings of fact when not asked to do so.

Mr. BROWN.—To save time, your Honor, I will submit judgments as to the transfer of licenses.

COURT.—The record may show that the other objections—take, for [57] instance, the first objec-

tion that you argued to the Court—will be denied.

Mr. McGOWAN.—To which ruling we except.

COURT.—The motions on the question with reference to striking the Referee's conclusions of law are denied, and accepted to this extent: That the Court after consideration will, independent of the fact that they are the Referee's findings, but probably using them as a guide, accept them as the findings of this Court, so modified as the subsequent ruling on the question of the transfer of the license from the steamer "Sarah" to the steamer "Hannah" may direct.

Mr. McGOWAN.—To which ruling defendant excepts.

COURT.—The exception is allowed.

Mr. McGOWAN.—And that goes to both cases, your Honor, the ruling as to our objections to the Referee's findings of fact and conclusions of law?

The COURT.—Yes. And you will have until Tuesday to prepare authorities on the matter of the transfer of the steamer license.

That thereafter, in pursuance of its ruling theretofore made, the Court did, on the 5th day of June, 1912, make and enter its Judgment, to which Judgment the defendant then and there excepted.

That thereafter, and within the time prescribed by law, the defendant in the above-entitled action served and filed its motion for a new trial, which was as follows, to wit: [58]

[Title of Court and Cause.]

Motion for New Trial.

To the Above-named Plaintiff, to James J. Crossley, Esq., United States District Attorney, and to John K. Brown, Esq., Assistant United States District Attorney.

You will please take notice that the above-named defendant now moves the above-named court to set aside its decision and judgment in the above-entitled action and to grant a new trial therein, on the following grounds, to wit:

(1) Insufficiency of the evidence to justify the decision and judgment of the Court in said action, and that said decision and judgment are against law.

(2) Errors in law occurring at the trial of said action and excepted to by the defendants.

This motion will be made upon the pleadings and all proceedings had and taken in this action, on file in the office of the Clerk of this Court, and at the hearing defendants will rely upon the following grounds:

I.

Insufficiency of the evidence to justify the decision of the Court in this that the uncontradicted evidence shows that the defendant was not conducting either a public dock, wharf, or warehouse, but, on the contrary, shows that the defendant owned a private dock or wharf, on which was constructed a shed, which was used for its private use only, and that it made no dock, wharf, or warehouse charges of any kind for goods handled over said private wharf or dock, and in this connection the defendant relies upon all of

the grounds set forth in its motion to set aside the Report of the [59] Referee herein, and upon the uncontradicted evidence, which fails to show that the defendant conducted either a public wharf, dock or warehouse.

II.

Errors of law occurring at the trial of said action and duly excepted to by the defendant, in that:

(a) The Court erred in holding that the defendant conducted a public wharf, warehouse, or dock.

(b) The Court erred in holding that the defendant was liable for a license tax of ten cents a ton on freight consigned to others than the defendant handled on its said public wharf at Fairbanks, Alaska, for the reason that the evidence fails to show that said defendant conducted a public wharf.

(c) The Court erred in approving and confirming the report of the Referee and in adopting the same as its findings of fact and conclusions of law.

(d) The Court erred in finding that there was due to plaintiff from the defendant the sum of \$2,199.94, or any other sum, on the total amount of freight handled over its said public wharf at Fairbanks, Alaska.

(e) The Court erred in adjudging and decreeing that the plaintiff have and recover from the defendant the sum of \$2,199.94, or any other sum whatsoever.

(f) The Court erred in adopting the report of the Referee in the above-entitled matter.

Dated at Fairbanks, Alaska, this sixth day of June,

A. D. one thousand nine hundred and twelve.

McGOWAN & CLARK,

Attorneys for Defendants.

[Endorsed]: No. 657. (Title of Court and Cause.)
Motion for a New Trial. Filed in the District Court,
Territory of Alaska, 4th Div. Jun. 6, 1912. C. C.
Page, Clerk. By H. C. Green, Deputy. [60]

After argument on said motion for new trial, the
said Court, on the 6th day of June, 1912, then and
there overruled and denied said motion for new trial,
and made and entered its order denying the motion
for new trial, which said order was as follows, to wit:

[Title of Court and Cause.]

Order Denying Motion for New Trial.

The defendant's motion for a new trial coming on
by consent to be heard on this date, Thos. A. Mc-
Gowan, Esq., of the firm of McGowan & Clark, ap-
pearing in favor of said motion, and John K. Brown,
Assistant United States Attorney, appearing in oppo-
sition thereto, and after hearing and consideration
by the Court;

It is ordered that the defendant's motion for a new
trial in the above-entitled action be, and the same is,
hereby denied.

The defendant then and there excepted to the rul-
ing of the Court and its exception is hereby allowed.

Done at Fairbanks, Alaska, this sixth day of June,
A. D. one thousand nine hundred twelve.

PETER D. OVERFIELD,

District Judge.

Entered in Court Journal No. 12, page 57.

[Endorsed]: No. 657. (Title of Court and Cause.) Order Denying Motion for New Trial. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 6, 1912. C. C. Page, Clerk. By H. C. Green, Deputy.

To which ruling of the Court and order denying said motion for new trial the defendant then and there excepted, and said exception was allowed by the Court. [61]

And now, in furtherance of justice and that right may be done the petitioner, the Northern Commercial Company, defendant, in the above-entitled action, presents the foregoing Bill of Exceptions in this cause and prays that the same may be settled and allowed and signed and certified by the Judge of this Court in the manner prescribed by law.

McGOWAN & CLARK,

Attorneys for Defendants.

Stipulation [Concerning Bill of Exceptions].

It is hereby stipulated as follows:

(1) That, within the time allowed by law, as extended by stipulations of counsel and confirmed by order of Court, the foregoing bill of exceptions was served upon plaintiffs by defendants' counsel, and the attorneys for plaintiff do hereby admit the due and timely service thereof.

(2) That the foregoing Bill of Exceptions may be settled and allowed by the Court as the bill of exceptions to be used on the appeal from the judgment made and entered in the above-entitled cause, whether said appeal be prosecuted by writ of error, or by appeal direct, or by both; attorneys for plain-

tiff hereby expressly agreeing that, inasmuch as counsel for both sides are in doubt as to whether said appeal should be prosecuted by an appeal direct, or by writ of error, or by both, therefore it is stipulated that the foregoing bill of exceptions, when settled and allowed, may be used by the defendants on any appeal that may be prosecuted from the judgment in this action, whether the same shall be prosecuted by appeal direct, or by writ of error, or by both, and that, in the event of a dismissal of either the appeal direct or of the writ of error, thereupon this bill of exceptions shall stand as the bill of exceptions to be used on the hearing in the Court of Appeals in whichever form [62] the same may be heard.

(3) That the foregoing bill of exceptions may be filed on this date in the office of the clerk of the above-entitled court, at Fairbanks, Alaska, and shall thereupon be mailed by the Clerk to Hon. Peter D. Overfield, formerly Judge of the above-entitled Court, but now Judge of the Third Judicial Division of the Territory of Alaska, at Valdez, Alaska, for his order settling and allowing the same; and that, pending the return thereof, the defendants' time for having the foregoing bill of exceptions settled and filed shall be extended accordingly; the attorneys for the plaintiff hereby agreeing that it shall not be necessary for defendants to procure further stipulations or orders extending the time to settle and file the foregoing bill of exceptions, and hereby expressly consenting that the said time shall be extended until the return of the said Bill of Exceptions as aforesaid.

Dated at Fairbanks, Alaska, this 19th day of November, 1912.

JAMES J. CROSSLEY,
U. S. District Attorney,
Attorney for Plaintiff.
By JOHN K. BROWN,
Asst. U. S. District Attorney.
McGOWAN & CLARK,
Attorneys for Defendants. [63]

[Title of Court and Cause.]

Order Settling and Allowing Bill of Exceptions.

On this — day of —, 1912, and within due time, the defendants in the action here entitled, by their attorneys, Messrs. McGowan & Clark, duly presented the foregoing bill of exceptions for settlement and allowance, in the manner prescribed by law and the practice of the above-named court; and it appearing to the Court, from the stipulation of counsel, that said bill of exceptions has been heretofore duly served and filed within the time allowed by law, and that the same is true and correct in all respects and contains all the material, testimony, evidence and exhibits, and other proof whatsoever, introduced by either party during the hearing of said cause; and the Court being fully advised in the premises;

It is ordered that the said bill of exceptions be, and the same is, hereby allowed, settled, approved, and signed as the bill of exceptions for use on appeal in the above-entitled cause, and that the same be made a part of the record in said cause;

It is further ordered that the said bill of exceptions

is settled and allowed as the bill of exceptions for use on the hearing of any appeal that may be prosecuted from the judgment in the above-entitled cause, whether the same be prosecuted by writ of error, or by appeal direct, or by both.

Done in open court, at Juneau, Alaska, on this 9th day [64] of December, A. D. 1912.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 12, page 214.

[Endorsed]: Original. No. 657. District Court, Fourth Division, Territory of Alaska. United States of America vs. Northern Commercial Company. Bill of Exceptions. Filed per Stipulation in the District Court, Territory of Alaska, 4th Div. Nov. 19, 1912. C. C. Page, Clerk.

In the District Court for the District of Alaska, Division No. 1. Filed Dec. 9, 1912. E. W. Pettit, Clerk. [65]

[Title of Court and Cause.]

Petition for Writ of Error.

The defendant, feeling itself aggrieved by the judgment of the Court made and entered in the above-entitled cause on the fifth day of June, A. D. one thousand nine hundred twelve, wherein and whereby the above-named court rendered judgment against said Northern Commercial Company for the sum of two thousand one hundred ninety-nine dollars ninety-four cents, together with costs.

Now come Messrs. McGowan & Clark, its attor-

neys, and petition this Honorable Court for an order, allowing this defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, according to the laws in that behalf made and provided;

And whereas the said defendant desires a stay of execution pending the hearing of the said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, now, therefore, said defendant petitions that an order be made, fixing the amount of security which said defendant shall give and furnish on said writ of error, and that, on the giving of such security, all further proceedings in this Court may be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

McGOWAN & CLARK,

Attorneys for Defendant.

May 19, 1913.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plff.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Petition for Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [66]

[Title of Court and Cause.]

Petition for Appeal.

Comes now the defendant, who, conceiving itself aggrieved by the judgment and decree of this Court, made and entered on the fifth day of June, A. D. one thousand nine hundred twelve, in the above-entitled cause, in the above-named court, does hereby appeal from the said judgment and decree, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of error filed herein, and appellant prays that this appeal be allowed and that a transcript of the records, proceedings, and papers on which said judgment and decree was made, together with all pleadings and the exhibits annexed thereto, testimony and proofs adduced in the case, judgments whether interlocutory or final, bill of exceptions, final decree, notice of appeal, and assignment of error, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California;

Defendant further prays that an order be made, fixing the amount of security which appellant shall give and furnish on said appeal, and that, on the giving of such security, all further proceedings in this Court shall be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner shall ever pray.

Dated on this 19th day of May, A. D. one thousand nine hundred thirteen.

McGOWAN & CLARK,

Attorneys for Defendant.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plff.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Petition for Appeal. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [67]

[Title of Court and Cause.]

Assignment of Errors.

**TO BE USED ON WRIT OF ERROR AND
DIRECT APPEAL AND BOTH.**

Comes now the defendant in the above-entitled cause, being the plaintiff in error or appellant, and assigns the following errors as having been committed by the above-named Court on the trial of the above-entitled action, which errors the said defendant intends to, and does, rely upon in its writ of error and appeal and both, to be prosecuted in the United States Circuit Court of Appeals for the Ninth Circuit.

(1) The Court erred in deciding (order of Judges Cushman and Overfield of date 24 August, 1911),

“That the defendant, the Northern Commercial Company, a corporation, is liable to pay the United States a license tax of ten cents a ton per annum for the years 1905 to 1911, both inclusive, on the amounts of freight handled upon its wharf at Fairbanks, Alaska, belonging to, consigned to, or consigned by persons or corporations other than the defendant herein.”

(2) The Court erred in its order of 24 August, 1911, by referring the said action to a referee for an accounting, and in compelling the defendant herein to enter into an accounting before said Referee.

(3) The Court erred in its said order of 24 August, 1911, in determining that the defendants were liable to pay any license tax and in not finding in favor of the defendant and dismissing the said action.

(4) The Court erred in its said order and in its final judgment herein in determining that the defendant was liable under that part of section 460 of the Code of Criminal Procedure [68] of the District of Alaska set forth in paragraph 2 of the Statement of Facts and Stipulation for Submission Without Action.

(5) The Court erred in finding against the contention of the defendant set out in paragraphs 4, 5, 6, 7, and 8 of said Statement of Facts and Stipulation for Submission Without Action, to wit, the defendant contended that it did not maintain or conduct a public dock, wharf, or warehouse at Chena or Fairbanks, but that it did maintain at Fairbanks warehouses, within which it stored merchandise belonging to it and which it transported by its steamers

from points outside of Alaska to the town of Fairbanks, and that it had a wharf and warehouse on the river bank in front of its premises in Fairbanks, at which steamers owned by it landed and unloaded the freight belonging to it and its shippers, but that no wharfage charge, dockage charge, or storage charge was made for freight so landed upon said wharf; that said defendant was not engaged in the business of prosecuting or attempting to prosecute public docks, wharves, or warehouses within the Territory of Alaska, and that all docks, wharves, or warehouses owned by it are maintained for the purpose of handling and holding goods, wares and merchandise belonging to defendant itself or the persons for whom it ships, and that defendant did not accept goods on storage for hire, nor did it permit boats other than its own to land at its wharves, warehouses, or docks, for the purpose of unloading goods for hire.

(6) The Court erred in finding against the contention of defendant set out in paragraph 9 of said Statement of Facts and Stipulation for Submission Without Action, to wit, that the defendant should not be compelled to pay a license fee of ten cents a ton on freight handled or stored by it.

(7) The Court erred in its judgment of 5 June, 1912, in ordering, adjudging and decreeing that the said report of the said Referee, including the findings of fact and conclusions of law, be in all respects approved and confirmed. [69]

(8) The Court erred in rendering judgment against the defendant and in approving the report

of said Referee, in this, that the evidence is contrary to the findings of said Referee and is insufficient to justify the said judgment, in the following particulars, to wit:

(a) That the uncontradicted evidence shows that the defendant did not maintain, conduct, prosecute, or attempt to prosecute the business of public docks, wharves, and warehouses, but, on the contrary, that the defendant maintained and conducted docks, warehouses, and wharves for its own private use.

(b) That the uncontradicted evidence shows that the defendant conducted, prosecuted, and maintained the business, among other things, of maintaining private warehouses, docks, and wharves for the use of itself and its shippers, and made no charge of any kind therefor, and that the said docks, wharves, and warehouses were constructed and maintained by it for its sole, exclusive and private use only.

(9) That the Court erred in adopting the Referee's report herein, in this, that the same is contrary to the evidence in the particulars set out in Assignment of Errors No. 8.

(10) The Court erred in adopting all those parts of Finding No. 3 of the Referee's report in which he finds that the defendant became liable to pay to the United States of America a license tax of ten cents a ton, amounting to the various amounts set forth in sections 1 to 7, inclusive, of said Finding.

(11) The Court erred in adopting Finding No. 4 of said Referee's report, to wit: "That said Northern Commercial Company is liable to pay to the

United States of America license tax on the total amount of freight handled upon its wharf at Fairbanks, Alaska, for the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911, inclusive, belonging, consigned to, or consigned by persons or corporations other than the defendant herein, on 21,999.42 tons at the rate of ten cents per ton, amounting to the aggregate to two thousand one hundred ninety-nine dollars and ninety-four cents, (\$2,199.94).” [70]

(12) The Court erred in adopting the Referee’s report herein and in determining by its judgment of 5 June, 1912, that the plaintiff do have and recover from the defendant the sum of \$2,199.94, together with its costs and disbursements.

(13) The Court erred in determining by its judgment of 5 June, 1912, that there was due from the defendant Northern Commercial Company the sum of \$2,199.94, or any other sum, for license fees on the warehouses, wharves, and docks in question.

(14) The Court erred in giving final judgment against the defendant and in refusing to render judgment in favor of defendant.

(15) The Court erred in overruling and denying the defendant’s motion for a new trial, and thereby determining that the evidence was sufficient to justify the judgment and that said judgment was sustained in law.

(16) The Court erred in rendering its said judgment of 5 June, 1912, in favor of the plaintiff and against the defendant, for the reason that said judgment is contrary to the evidence; the evidence is insufficient to justify the same; and that said decision

and judgment are contrary to law.

(24) The Court erred in rendering judgment against defendant for its costs.

WHEREFORE: The defendant prays that the judgment in the above-entitled action may be reversed and that it may be allowed all things that it has lost thereby.

19 May, 1913.

McGOWAN & CLARK.

Attorneys for Defendant.

Due service of the foregoing assignment of errors is hereby admitted this nineteenth day of May, 1913, and it is stipulated that the same may be used on appeal and writ of error and both.

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plaintiff.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Assignment of Errors. Filed in the District Court, Territory of Alaska, 4th Div., May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [71]

[Title of Court and Cause.]

Order Allowing Writ of Error and Fixing Bond.

On motion of Messrs. McGowan & Clark, attorneys for defendant, and the filing of a petition for a writ of error and assignment of error.

It is ordered that a writ of error be, and the same

is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, the judgment heretofore made and entered herein on the fifth day of June, A. D. one thousand nine hundred twelve, and that the amount of the bond on said writ of error be, and the same is, hereby fixed at the sum of five thousand dollars, to cover supersedeas, costs, and damages of defendant in error.

Dated at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 590.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Order Allowing Writ of Error and Fixing Bond. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy.

Due service hereof admitted this May 19, 1913,

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plff. [72]

[Title of Court and Cause.]

**Order Allowing Appeal and Fixing Amount of
Appeal Bond.**

Now, on this 19th day of May, A. D. one thousand nine hundred thirteen, the same being one of the

judicial days of the December, A. D. one thousand nine hundred twelve, special term of the Court, holden at Fairbanks, in the Fourth Judicial Division of the Territory of Alaska, this cause came on to be heard on the defendant's petition for an appeal, and the Court being advised in the premises,

It is ordered that the defendant's appeal in said cause to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, be, and the same is, hereby allowed, and that a certified transcript of the record, and all proceedings, judgments whether interlocutory or final, decrees, orders, testimony, bill of exceptions, opinions of the Court, notice of appeal, assignment of error, and exhibits be transferred to the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California;

It is further ordered that the bond for the sum of five thousand dollars, this day filed in this cause, conditioned for the payment of all costs, judgments, and damages that may be rendered by the said United States Circuit Court of Appeals for the Ninth Circuit, whether the same be rendered under writ of error or on direct appeal, shall act and take effect as a supersedeas bond on direct appeal, and also as a bond for costs and damages on appeal, and that no other or further bond be required to be given by defendants. [73]

Done in open court at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 590.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plff.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Order Allowing Appeal and Fixing Amount of Appeal Bond. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [74]

[Title of Court and Cause.]

Order Relative to Supersedeas Bond on Writ of Error.

The defendant above named having, on this day, filed its petition for writ of error from the decision and judgment thereon made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which defendants shall give and furnish on said writ of error, and that, on the giving of said security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals for the Ninth Circuit, and said petition having on this day been duly allowed:

Now, therefore, it is ordered that, on the defendant above named filing with the clerk of this Court a good and sufficient bond in the sum of five thousand dollars, to the effect that, if the said defendant and plaintiff in error shall prosecute the said writ of error to effect, and shall answer and pay all judgments, damages, and costs, if it shall fail to make good its said plea, then said obligation to be void, otherwise to remain in full force, effect, and virtue,—the said bond to be approved by the Court,—all further proceedings in this court shall be, and they are, hereby suspended and stayed until the determination of the said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California. [75]

Dated at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 12, page 590.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plff.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Order Relative to Supersedeas Bond on Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [76]

[Title of Court and Cause.]

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Northern Commercial Company, a corporation, appellant herein, as principal, and Volney Richmond and C. J. Hurley, as sureties, are held and firmly bound unto the United States of America, appellee herein, in the sum of five thousand dollars, to be paid to the said United States of America, appellee, for the payment whereof, well and truly to be made, we bind ourselves, and each of, and our and each of our heirs, executors, administrators, successors in interest, and assigns, firmly by these presents.

Sealed with our seals and dated this nineteenth day of May, A. D. one thousand nine hundred thirteen.

Whereas, lately, at a District Court for the Territory of Alaska, Fourth Judicial Division, holden at Fairbanks, Alaska, in a suit pending in said court between the United States of America as plaintiff and Northern Commercial Company as defendant, a judgment was rendered against the defendant Northern Commercial Company for the sum of two thousand one hundred ninety-nine dollars ninety-four cents, and the said defendant having obtained a writ of error and having been allowed an appeal, and having filed copies thereof in the clerk's office of the said Court, to reverse the judgment in the aforesaid suit, and citations on writ of error and on appeal having been directed to the said United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court

of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said Circuit, on the [77] — day of —, A. D. one thousand nine hundred — next;

And whereas the above-named appellant has appealed by writ of error and appeal,—being uncertain as to whether the above-entitled action is an action in equity or an action at law,—to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the orders, judgments, and decrees of the above-entitled court in this cause;

And whereas it has been stipulated by counsel for both parties to this action that both sides are in doubt as to whether such appeal should be prosecuted by an appeal direct or by writ of error, and that these presents shall be considered as a supersedeas bond either on writ of error or appeal, when the said Circuit Court of Appeals for the Ninth Circuit shall have determined the nature of said action, as more fully appears from the stipulation contained in the bill of exceptions settled in this action.

Now, therefore, the conditions of this obligation are such that, if the above-named Northern Commercial Company shall prosecute said writ of error or appeal, or either or both, to effect, and shall answer and pay all damages and costs if it shall fail to make good its plea, either on appeal or on writ of error, then this obligation shall be void; otherwise to remain in full force, effect and virtue;

And whereas appellants in error or on appeal desire a stay of execution in the above-entitled action, pending the determination of said appeal or writ of error;

Now therefore, the further condition of this obligation is such that, if the said Northern Commercial Company, appellant, shall prosecute either said writ of error or said appeal to effect, and shall answer and pay all damages, costs, and judgments, if it fails to make good its said plea, then the foregoing obligation to be void; otherwise to remain in full [78] force, effect and virtue.

NORTHERN COMMERCIAL COMPANY.

By VOLNEY RICHMOND,

Superintendent and Attorney in Fact.

VOLNEY RICHMOND,

C. J. HURLEY.

Territory of Alaska,

Fourth Division,—ss.

Volney Richmond and C. J. Hurley, being first duly sworn, each for himself and not one for the other doth depose and say that he is a resident of Fairbanks Precinct, Territory of Alaska, and is worth the sum of five thousand dollars, to wit, the sum specified as the penalty in the foregoing bond, over and above all his just debts and liabilities, in property not exempt from execution and situate within the Territory of Alaska.

VOLNEY RICHMOND.

C. J. HURLEY.

Subscribed and sworn to before me on this nineteenth day of May, A. D. one thousand nine hundred thirteen.

[Seal]

JOHN A. CLARK,

Notary Public in and for the District of Alaska.

It is stipulated that the foregoing bond may be accepted and approved as a supersedeas and cost bond, either on appeal or on writ of error, in the above-entitled action; that the same is sufficient in form; and that the sureties thereon may be approved by the Court.

Dated at Fairbanks, Alaska, this nineteenth day of May, A. D. one thousand nine hundred thirteen.

JAMES J. CROSSLEY,
United States District Attorney for the Territory of
Alaska, Fourth Judicial Division,

Attorney for Plaintiff.

McGOWAN & CLARK,
Attorneys for Defendant. [79]

Pursuant to the foregoing stipulation, the foregoing bond and the sureties thereon are hereby approved and accepted.

Dated at Fairbanks, Alaska, this nineteenth day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Company, Defendant. Bond on Appeal and Supersedeas. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney for Plff. [80]

[Title of Court and Cause.]

**Designation of Place for Hearing of Writ of Error
and Appeal.**

To the Honorable FREDERIC E. FULLER, Judge
of the Above-named Court, and to the Plaintiff
and Its Attorney:-

Now comes the defendant, plaintiff in error, in the
above-entitled action, and, pursuant to the provisions
of an act of Congress, giving the designation of the
place of hearing appeals for the Ninth Circuit to
the plaintiff in error or the appellant, does hereby
designate the City and County of San Francisco, in
the State of California, as the place for the hearing
of the writ of error and appeal in the above-entitled
action.

McGOWAN & CLARK,
Attorneys for Defendants.

Due service hereof admitted this May 24, 1913.

JAMES J. CROSSLEY,
United States District Attorney for the Territory of
Alaska, 4th Div.,

Attorney for Plff.
By J. K. BROWN,
Assistant.

[Endorsed]: No. 657. In the United States Dis-
trict Court, Territory of Alaska, Fourth Division.
United States of America, Plaintiff, vs. Northern
Commercial Co., Defendant. Designation of Place
for Hearing of Writ of Error and Appeal. Filed in
the District Court, Territory of Alaska, 4th Div.
May 24, 1913. C. C. Page, Clerk. By P. R. Wagner,
Deputy. [81]

[Title of Court and Cause.]

Writ of Error.

United States of America,
Territory of Alaska,—ss.

The President of the United States of America to the
Honorable FREDERIC E. FULLER, Judge of
the District Court for the Territory of Alaska,
Fourth Division, Greeting:

Because, in the records and proceedings, as also in the rendition of a judgment dated the fifth day of June, A. D. one thousand nine hundred twelve, of a plea which is in the said District Court for the Territory of Alaska, Fourth Division, before you, between the United States of America as plaintiff and Northern Commercial Company as defendant, a manifest error hath happened, to the great prejudice and damage of the said Northern Commercial Company, as is said and appears by the petition herein;

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if said judgment be therein given, then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, together with this writ, so as to have the same at the said place in the said Circuit on the sixteenth day of June, A. D. one thousand nine hundred thirteen, that, the records and proceedings aforesaid being in-

spected, the said United States Circuit Court of Appeals [82] for the Ninth Circuit may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 19th day of May, A. D. one thousand nine hundred thirteen.

Attest my hand and the seal of the District Court for the Territory of Alaska, Fourth Division, at the clerk's office at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

[Seal]

C. C. PAGE,

Clerk of the District Court for the Territory of Alaska, Fourth Division.

Allowed this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,

Judge of the District Court for the Territory of Alaska, Fourth Division. [83]

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plff.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Writ of Error. [84]

[Title of Court and Cause.]

Citation on Writ of Error.

United States of America,

Territory of Alaska,—ss.

The President of the United States of America to
the United States of America and to James J.
Crossley, United States District Attorney for
the Territory of Alaska, Fourth Division, Its
Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to the writ of error filed in the office of the clerk of the District Court for the Territory of Alaska, Fourth Division, wherein the United States of America is defendant in error and Northern Commercial Company is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should be corrected and speedy justice should not be done to the parties in error in that behalf.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United States of America, on this 19th day of May, A. D. one thousand nine hundred thirteen, and in the year of our Independence the one hundred thirty sixth.

F. E. FULLER,

District Judge Presiding in and for the Fourth Judicial Division of the Territory of Alaska. [85]

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney.

Attorney for Plff.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Citation on Writ of Error. [86]

[Title of Court and Cause.]

Citation on Appeal.

The President of the United States of America to the Above-named Plaintiff and to James J. Crossley, United States District Attorney for the Territory of Alaska, Fourth Division, Its Attorney, Greeting:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an order allowing appeal made and entered in the above-entitled cause, in which the United States of America is plaintiff and appellee, and Northern Commercial Company is defendant and appellant, to show cause, if any there be, why the judgment and decree made and entered in said action on the fifth day of June, A. D. one thousand nine hundred twelve, as in said order allowing appeal mentioned, should not be set aside and reversed and why speedy justice should not be done to said defendant in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, on this 19th day of May, A. D. one thousand nine hundred thirteen, and in the year of our Independence the one hundred thirty-sixth.

Attest my hand and the seal of the above-named District Court, at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen,

F. E. FULLER,

District Judge. [87]

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plff.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Citation on Appeal. [88]

[Title of Court and Cause.]

Order Extending Time Within Which to Perfect Appeal.

On this day the above-entitled cause came on to be heard before the Judge in the above-named court, on the application of the defendant herein for an order extending the return days for writ of error and appeal herein, and the parties appearing by their respective attorneys, and it appearing to the Court that it is necessary, owing to the great distance from Fairbanks, Alaska, to San Francisco, California,

and the slow and uncertain communication between said places, that an order extending the time within which to docket said cause and to file the record therein with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, until and including the first day of August, A. D. one thousand nine hundred thirteen, should be made, the Court, being fully advised in the premises and deeming that good cause exists therefor;

It is hereby ordered that the time within which said appellant shall perfect said cause on appeal and upon writ of error and both, and docket and file the record thereof in said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and the same is, hereby enlarged and extended to and including the first day of August, A. D. one thousand nine hundred thirteen;

It is further ordered that but one record need be transmitted to the said Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that said record shall be [89] used on the hearing of said appeal and on writ of error and both.

Dated at Fairbanks, Alaska, on this 24th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

O. K.—J. J. C., U. S. Atty.

Entered in Court Journal No. 12, page 601. [90]

Due service hereof admitted this May 24, 1913.

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plff.

By **JOHN K. BROWN,**

Assistant.

[Endorsed]: No. 657. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., Defendant. Order Extending Time Within Which to Perfect Appeal. Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [91]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

[Title of Court and Cause.]

United States of America,

Territory of Alaska,

Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify, that the above and foregoing, and hereto annexed, ninety-one typewritten pages, numbered from 1 to 91, inclusive, constitute a full, true and correct copy, and the whole thereof, including the indorsements, of the record in cause No. 657, entitled: United States of America, Plaintiff, vs. Northern Commercial Company, a Corporation, Defendant, wherein

the United States of America is Defendant in Error and Appellee, and the Northern Commercial Company is Plaintiff in Error and Appellant, made in accordance with the praecipe of the Plaintiff in Error and Appellant, and filed herein and made a part hereof; and that the same is by virtue of the writ of error, order of appeal, and citations issued in said cause and is a return thereof in accordance therewith.

And I further certify that this transcript was prepared by me, in my office, and that the costs of preparing same, and certificate, amounting to thirty-five dollars and forty-five cents (\$35.45) was paid to me by counsel for plaintiff in error and appellants.
[92]

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court, at Fairbanks, Alaska, this fourteenth day of June, 1913.

[Seal] C. C. PAGE,
Clerk District Court, Territory of Alaska, Fourth
Division.

By H. C. Green,
Deputy. [93]

[Endorsed]: No. 2294. United States Circuit Court of Appeals for the Ninth Circuit. Northern Commercial Company, Plaintiff in Error and Appellant, vs. United States of America, Defendant in Error and Appellee. Transcript of Record. Upon Writ of Error to and upon Appeal from the United States District Court of the Territory of Alaska, Fourth Division.

Received July 28, 1913.

F. D. MONCKTON,
Clerk.

Filed July 28, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2294

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN COMMERCIAL COMPANY,
Plaintiff in Error and Appellant,

VS.

UNITED STATES OF AMERICA,
Defendant in Error and Appellee.

BRIEF OF PLAINTIFF IN ERROR AND APPELLANT.

STATEMENT OF THE CASE.

This case is before the court upon writ of error to and upon appeal from the United States District Court of the territory of Alaska, fourth division. The case was submitted to the court below upon an agreed statement of facts and a stipulation to submit the controversy without action under and pursuant to the provisions of Chapter 28 of the Civil Code of Procedure of the District of Alaska. From the agreed statement of facts appearing on pages 4 to 9, inclusive, of the transcript, it appears that the appellant is a corporation under the laws of the State of New Jersey carrying on a general mer-

chandise and transportation business in the territory of Alaska.

By Section 460 of the Code of Criminal Procedure of the District of Alaska it is provided that

“any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for permission so to do from the District Court or subdivision thereof in said district and pay for said license for the respective lines of business and transportation as follows, to wit: * * * public docks, wharves and warehouses, ten cents per ton on freight handled or stored.”

It is stipulated that during the last three years defendant has been carrying on a merchandise and transportation business in the territory of Alaska and has handled a large amount of freight for itself and its shippers.

It is stipulated that a portion of such freight has been landed at the town of Chena for transportation from that point by rail to the town of Fairbanks. The appellant contends that it has not been conducting a public dock, wharf or warehouse at Chena or at Fairbanks but that it maintains at Chena a building within which at certain times appellant stores general merchandise belonging to it and to its shippers and that it maintains at Fairbanks warehouses within which it stores merchandise belonging to it and which appellant transports by its steamers from points outside of Alaska to Fairbanks.

It is stipulated that appellant has a wharf or warehouse on the river bank in front of its premises at Fairbanks at which some boats owned by appellant land and unload the freight belonging to appellant and other shippers but that no wharfage charge, dock charge or storage charge is made for freight so landed upon such wharf. That appellant is not engaged in prosecuting or attempting to prosecute the business of public docks, wharves or warehouses within the territory of Alaska and that all such docks, wharves or warehouses are private and used solely for the purpose of handling and holding merchandise belonging to appellant itself or the person for whom it ships; that appellant does not accept goods on storage for hire nor does it permit boats other than its own to land at its warehouse or docks for the purpose of unloading goods for hire.

The government contends that the wharves, warehouses and docks are public and that appellant is liable to pay a tax or license fee of ten cents per ton on freight handled or stored.

The original statement of facts was supplemented by stipulation (page 37 trans.) to show that since the filing of the original statement of facts and during the years 1907, 1908, 1909, 1910, 1911, appellant has been conducting a wharf at Fairbanks in the same manner as set forth in the original statement of facts and that the court shall determine whether or not the appellant is liable to pay a license tax on

the amount of freight handled upon its wharf at Fairbanks belonging or consigned to or consigned by corporations other than the appellant herein during said years and the amount thereof, in short, that the court shall have jurisdiction in said cases to determine the controversy between the parties from the year 1905 down to and including the year 1911.

Upon the foregoing statement of facts the matter was referred by the court to a referee to take proofs as to the amount of freight consigned to others than the appellant, handled at its wharf at Fairbanks, Alaska, and the referee found that the sum of \$2199.94 was due by appellant to the United States on the total amount of freight handled by appellant upon its wharf at Fairbanks, Alaska, during the years 1905-1911, inclusive, said amount of freight so handled having been found by the referee to be 21994.42 tons (trans. pages 53-55) and thereupon the court entered judgment thereon (trans. page 121).

ASSIGNMENT OF ERRORS RELIED UPON.

As the only question in this case is whether or not the wharf maintained by appellant at Fairbanks, Alaska, was a public or private wharf and as all the assignments of errors involve this question and the liability of appellant to pay a license tax of ten cents per ton on freight handled or stored on such wharf appellant will treat them collectively and argue as-

signments (1) and (8) as typical of all the assignments contained on pp. 72 to 77 of the transcript.

“Assignment of Error No. (1). The court erred in deciding (order of Judges Cushman and Overfield of date 24 August, 1911), ‘That the defendant, the Northern Commercial Company, a corporation, is liable to pay the United States a license tax of ten cents a ton per annum for the years 1905 to 1911, both inclusive, on the amounts of freight handled upon its wharf at Fairbanks, Alaska, belonging to, consigned to, or consigned by persons or corporations other than the defendant herein.’ ”

“Assignment of Error No. 5. The court erred in finding against the contention of the defendant set out in paragraphs 4, 5, 6, 7, and 8 of said Statement of Facts and Stipulation for Submission Without Action, to wit, the defendant contended that it did not maintain or conduct a public dock, wharf, or warehouse at Chena or Fairbanks, but that it did maintain at Fairbanks warehouses, within which it stored merchandise belonging to it and which it transported by its steamers from points outside of Alaska to the town of Fairbanks, and that it had a wharf and warehouses on the river bank in front of its premises in Fairbanks, at which steamers owned by it landed and unloaded the freight belonging to it and its shippers, but that no wharfage charge, dockage charge, or storage charge was made for freight so landed upon said wharf; that said defendant was not engaged in the business of prosecuting or attempting to prosecute public docks, wharves, or warehouses within the Territory of Alaska, and that all docks, wharves, or warehouses owned by it are maintained for the purpose of handling and holding goods, wares and merchandise belonging to defendant itself or the persons for whom it ships, and that defend-

ant did not accept goods on storage for hire, nor did it permit boats other than its own to land at its wharves, warehouses, or docks, for the purpose of unloading goods for hire."

ARGUMENT.

The evidence showed that Northern Commercial Company, appellant herein, is a corporation incorporated in New Jersey and carrying on a general merchandise business in Alaska. Until 1907 the Northern Commercial Company maintained and owned a fleet of vessels for the purpose of transporting its merchandise and general freight. In 1907 the Northern Navigation Company was incorporated by the same stockholders as in the Northern Commercial Company for the purpose of taking over the transportation business of the latter. These two companies are for the purposes of this case one and the same (trans. pp. 21-24).

The Northern Commercial Company, appellant, built a wharf at Fairbanks, Alaska, on the land in front of their town property on the water front (trans. p. 26). The appellant acquired the water front by deed from the government. The town of Fairbanks was originally a trading site and afterward incorporated. The appellant was in possession of the water front at the time the town was incorporated (1903) and has a deed from the town-site trustee under patent received by him (trans. pp. 28, 29, 30, 31, 32, 33). Appellant owns a wharf

at Fairbanks, constructed at its own expense for the purpose of handling freight, transferring freight from the steamers to the consignees and to its own stores. There is a warehouse on the wharf used for the storage of appellant's own supplies. The cost of upkeep of the Fairbanks wharf is defrayed out of appellant's general funds. Many shippers ship their goods over appellant's line of steamboats operating on the Yukon and Tanana Rivers in Alaska and such goods pass through appellant's wharf at Fairbanks. The wharf is also used to maintain an office where passengers on the steamboats coming or going from Fairbanks on the Tanana River and Yukon River may purchase their tickets and check their baggage. Shippers over appellant's line pay freight charges contained in a published tariff rate and these charges are the only charges which are made by appellant. The cost of maintaining the wharf and long shoring cost is included in the general cost of operating the company.

I.

The statute of Alaska with which we are concerned in this proceeding is Section 2569, *Compiled Laws of the territory of Alaska*.

“That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do from a district

court or a sub-division thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit:

* * *

“Freight and transportation lines, propelled by mechanical power registered in Alaska, or not paying license or tax elsewhere, and river and lake steamers, as well as transportation lines doing business wholly within the district of Alaska, one dollar per ton per annum on net tonnage, customhouse measurements, of each vessel.”

“Mercantile establishments: doing a business of one hundred thousand dollars per annum, five hundred dollars, per annum,” etc.

“Ships and shipping: Ocean and coastwise vessels doing local business for hire, plying in Alaskan waters, registered in Alaska, or not paying license or tax elsewhere, one dollar per ton per annum on net tonnage, customhouse measurement of each vessel.”

“Public docks, wharves and warehouses, ten cents per ton on freight handled or stored.”

In the foregoing extract only those lines of business which might include the business transacted by appellant are quoted. It is in evidence that appellant transacts a general merchandise business and pays therefor five hundred dollars per annum as required by the foregoing statute of mercantile establishments doing a business of one hundred thousand dollars per annum (trans. pp. 17-18).

A license is also required by said statute of freight and passenger transportation lines and ocean and coastwise vessels.

The agreed statement of facts and the evidence show clearly that appellant and Northern Navigation Company used the Fairbanks wharf as incidental to and for the convenience of their mercantile and transportation business. The maintenance of the wharf in itself was not a "a line of business" within the meaning and intent of the statute.

"Nothing is better settled than that statutes should receive a sensible construction such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. The intention of Congress as expressed in the act of June 6th, 1900 (*the act under consideration here*) was to levy a license tax upon the prosecution of the business of handling freight in connection with a public dock, wharf or warehouse and to the extent of the use of such structure for that purpose" (our italics).

John J. Sesnon Co. v. U. S., 182 Fed. 573.

No wharfage was charged and no vessels used the wharf except those of appellant.

The case of *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 48 L. Ed. 496, goes further than is necessary to sustain our position in this matter. There a tax was laid on the gross annual receipts of a company carrying on or doing the business of refining sugar. The wharves owned by the appellant in that case were in use by the public and a wharfage fee was charged. The Supreme Court nevertheless held that under the circumstances of the case the wharfage receipts were part

of the general receipts of appellant's business and were subject to the tax.

The following quotation from the Spreckels case will throw further light upon our contention:

"It was in proof that the plaintiff owned three wharves on the Delaware River, at which vessels landed and for the use of which these vessels paid wharfage according to the rates prescribed by a general tariff. A large part, nearly all, of the sugar refined by the plaintiff was brought into the port of Philadelphia by vessels which come to those wharves and such vessels paid wharfage according to that tariff. Many vessels brought raw sugar which the refining company had purchased abroad. The wharves were built by the plaintiff for the purpose of transacting any business that it might have or for which it saw fit to use them. And nearly all the business done at that time at the wharves was the unloading of sugar consigned to the plaintiff. The exceptions were too few to be regarded as material. Upon its receipts from such wharfage the plaintiff had been compelled to pay a tax. Was it required to pay a tax upon receipts of profits from that source?" * * *

"On this question the Circuit Court said: 'Scarcely any vessels lie at these wharves except the vessels that bring raw sugar to the plaintiff, and the wharves are used for the convenience and greater profit of the corporate enterprise. The money paid by the vessels for wharfage, is, I think a receipt of the business.' * * *

"This question is not wholly free from difficulty. But we think the better reason is with the ruling in the Circuit Court and in the Circuit Court of Appeals, to the effect that *the wharves in every substantial sense constituted*

*a part of the plaintiff's 'plant', and, if not absolutely necessary, were of great value, in the prosecution of its business; and that receipts derived by plaintiff from the use of the wharves by vessels, particularly because, with rare exceptions, the vessels using them brought to the plaintiff the raw sugar which it refined, were receipts in its business of refining sugar. The primary use of the wharves was in connection with, and in the prosecution of that business. * * ** The wharves were part of the instrumentalities and conveniences employed by plaintiff for the successful management and conduct of its business of refining sugar."

The license imposed by the act hereinabove referred to, being levied on "lines of business", it appears that the government is placed in a curious position by virtue of its agreement to the stipulated statement of facts as the same appears on pp. 4 to 9 of the transcript. Paragraph VII thereof reads:

"That said defendant is not engaged in the business of prosecuting or attempting to prosecute public docks, wharves or warehouses within the District of Alaska, and all docks, wharves or warehouses owned by it are maintained for the purpose of handling and holding goods, wares and merchandise belonging to the defendant itself, or the persons for whom it ships."

Certainly if the appellant is not engaged in the business of prosecuting public docks wharves or warehouses, the judgment of the court that appellant is liable to pay a tax on freight handled or

stored at the Fairbanks wharf is at variance with and contrary to the stipulation of the parties to the action.

II.

If the wharf maintained by appellant at Fairbanks was a private and not a public wharf, the judgment of the court upon the report of the referee finding appellant liable for the sum of \$2199.94, for license taxes on the total amount of freight handled upon its public wharf at Fairbanks, Alaska, during the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911 inclusive belonging, consigned to or consigned by persons or corporations other than appellant was erroneous.

The question before us in this case has been adjudicated in this court in the case of *John Sesnon & Co. v. United States*, 182 Fed. 573. The same provision of the Alaskan statute was under consideration there. It appeared from the evidence in that case that the defendant would make a contract and did make contracts with anyone for the use of the wharf in handling freight between ship and shore. There was no evidence in the case that the defendants refused to serve all vessels alike under the same conditions; on the contrary the evidence showed that the defendant is serving all vessels and corporations alike and that it is ready to make contracts with others for like

service. The following instruction was given to the jury and approved by this court in the opinion:

“The question whether the wharf conducted by the defendant was a public or private one depends on how the company has conducted it on the day stated in the information. Were they receiving freight as a lighterage company and as wharfinger indiscriminately from all persons who applied for that accommodation and charging tolls therefor, why then it may be public; if they were discriminating or refusing freight from some and accepting it from others then, of course, it would not be a public wharf. The business of conducting a wharf is a business incident and part of the lighterage business and you will remember that they have as a lighterage company received freight without any discrimination as to persons or as to consignees from all persons, all comers, all those who applied for the benefit of their lighter plant and their lighter services, why then it was a public wharf. *If they only landed freight for their own purposes, for their own uses, why then of course it would be a private wharf and would not be subject to a license.*”

The evidence in the case at bar showed, without contradiction that the wharf was only used by the vessels of appellant. That no wharfage fee was charged, no lighterage, no wharfinger fees. Appellant in this case entered into no contract with anyone for the use of the wharf in handling freight between ship and shore as was the case in the Sesnon decision. In the Sesnon case the defendant was a corporation organized under the laws of the State of California, doing business in

Alaska and engaged principally in the business of lighterage at Nome Roadstead.

In the light of the following expressions of opinion as to what constitutes a public wharf we are confident that the structure in the case at bar must be held to be a private wharf used as incident to and for the greater convenience of the mercantile and transportation business of appellant.

Dutton v. Strong, 1 Black (U. S.) 35; 17 L. Ed. 29.

“Piers or landing places and even wharves may be private, or they may be in their nature public, although the property may be in an individual owner, or in other words the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use; or he may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend in case of dispute upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located and the nature and character of the structure. Undoubtedly a riparian proprietor may construct anyone of these improvements for his own exclusive use and benefit,” etc.

Transportation Co. v. Parkersburg, 107 U. S. 691; 27 Law. Ed. 584.

“It is undoubtedly a general rule of law, in reference to all public wharves, that wharfage

must be reasonable. A private wharf, that is, a wharf which the owner has constructed and reserves for his private use, is not subject to this rule; for if any person wishes to make use of it for a temporary purpose, the parties are at liberty to make their own bargain. That such wharves may be had and owned even on a navigable river, is not open to controversy. It was so decided by this court in *Dutton v. Strong*, 1 Black (U. S.) 23 (66 U. S. XVII, 29), and in *Yates v. Milwaukee*, 10 Wall 497 (77 U. S. XIX, 984), whether a private wharf may be maintained as such, where it is the only facility of the kind in a particular port or harbor may be questioned."

This question has been resolved in favor of the owner of a private wharf in *Louisville R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483; 49 L. Ed. 1135.

Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672; 27 Law. Ed. 1070.

"A riparian proprietor in the language of Mr. Chief Justice Miller in *Yates v. Milwaukee*, 10 Wall 497-504 (77 U. S. XIX, 984, 986), is one whose land is bounded by a navigable stream, and among the rights he is entitled to as such, are "access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use, or for the use of the public, subject to such rules or regulations as the legislature may see proper to impose for the protection of the rights of the public, whatsoever those may be."

Weems Steamboat Company v. People's Steamboat Co., 214 U. S. 345; 16 Ann. Cas. 1222.

In this case it appeared that complainant is a corporation which has been engaged in the business of transportation of passengers and freight between Baltimore and various landings on the Rap-
pahanock River, and for many years has been the owner or lessee of the wharves on that river mentioned in the bill of complaint. The defendant made use of the wharves of complainant against its will. There was no evidence of dedication of the wharves to the public nor of any condemnation thereof by any public authority.

The court said:

“The rights of a riparian owner upon a navigable stream in this country are governed by the law of the State in which the stream is situated. These rights are subject to the paramount public right of navigation. The riparian proprietors have the right among others, to build private wharves out so as to reach the navigable waters of the stream. *Dutton v. Strong*, 1 Black 23, 17 U. S. (L. Ed.) 29; *Yates v. Milwaukee*, 10 Wall 479, 19 U. S. (L. Ed.) 984; *Parkersburg, etc., Transportation Co. v. Parkersburg*, 107 U. S. 691, 699, 2 S. Ct. 732, 27 U. S. (L. Ed.) 584; *Illinois Central R. Co. v. Illinois*, 146 U. S. 387, 445, 13 S. Ct. 110, 36 U. S. (L. Ed.) 1018; *St. Anthony Falls Water Power Co. v. St. Paul Water Com’rs*, 168 U. S. 349, 368, 18 S. Ct. 157, 42 U. S. (L. Ed.) 497. The courts of the State of Virginia affirm the same rights of the riparian proprietor. *Norfolk v. Cooke*, 27 Gratt. 430, 435; *Alexandria etc. R. Co. v. Faunce*, 31 Gratt. 761, 765. If the wharf obstructs navigation or the private rights of others, or if it encroach upon any public landing, the

wharf may be abated. *Code of Virginia* (1887), Sec. 998. A private wharf on a navigable stream is thus held to be the property which cannot be destroyed or its value impaired, and it is property, the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that it or any part of it be taken for the public use due compensation must be made. The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while at the same time denying its use by anyone else."

Compton v. Hankins, 90 Ala. 411; 24 Am. St. 823.

"The plaintiff, however, bases his right to recover on the alleged ground that the landing is public. Wharves or landings may be either private or public in their nature. If public the owner is under obligations to concede to others the privilege of landing their goods; if private, he has the right to the exclusive use and enjoyment or to permit such individuals to enjoy it as he sees proper. Whether a wharf or landing is public or private depends upon the ownership of the soil, the purposes for which it was built, the authority by which it was erected, the uses to which it has been applied and the nature and character of the structure. If the land on which it is constructed is vested in the public, or if built by public authority on land condemned, or if it be at the terminus of a public highway, and practically forms a part thereof, or has been dedicated by the owner to the use of the public, it may be regarded as a public wharf or landing.

The right to erect a landing on a navigable stream, having its foundation in the ownership of the land, when erected by an individual at his own expense, it is private property: Wharf case 3 *Bland* 361. It is well settled that the public may acquire an easement, a right to the use of such landing, by dedication on the part of the owner of the soil. But use by individuals, with the permission of the owner does not give the public the right to do the same without his consent. Use by the public, with his permission and for his own emolument, for no number of years will amount to dedication." * * * "The objects for which a private landing may be held and used may be public, without affecting its private character. In such case there is an implied license to vessels navigating the stream to use it for receiving and discharging freight and passengers and also to all persons to occupy it for lawful and accustomed purposes; but the owner may at any time revoke the license as to the entire public, or withhold permission from particular vessels or persons."

From the foregoing decisions, the following principles may be said to be established:

A riparian proprietor may construct a wharf for his own exclusive use and benefit.

A private wharf may be had, owned and maintained on a navigable stream.

The considerations which determine whether or not a wharf is public or private are the following:

First. The purposes for which it was built.

Second. The uses to which it has been applied.

Third. The authority by which it has been erected.

Fourth. The ownership of the soil.

Fifth. The place where located.

Sixth. The nature and character of the structure.

Seventh. Dedication to the public.

Applying these considerations to the case at bar with particular reference to the testimony and agreed facts in this case, we feel that we can demonstrate that appellant's wharf is not public according to the judicial definitions of a public wharf.

First. The purpose for which it was built.

Agreed statement of facts paragraph VII.

“That said defendant is not engaged in the business of prosecuting or attempting to prosecute public docks, wharves, or warehouses within the Territory of Alaska, and all docks, wharves or warehouses owned by it are maintained for the purpose of handling and holding goods, wares and merchandise belonging to the defendant itself, or the persons for whom it ships.”

Second. The uses to which it has been applied.

Agreed statement of facts paragraphs VI and VIII.

“That said defendant has a wharf and warehouse on the river bank in front of its said premises in Fairbanks aforesaid, at which steamboats owned by it, land and unload the freight belonging to the said defendant and its shippers; but that no wharfage charge, dockage

charge or storage charge is made for freight so handled upon said wharf."

"That defendant does not accept goods on storage for hire, nor does it permit boats other than its own to land at its warehouses or docks for the purpose of unloading goods for hire."

Third. The authority by which it has been erected, and

Fourth. The ownership of the soil.

Testimony of A. R. Heilig, pp. 30-32 transcript.

"Q. Explain in your own way the manner in which the town was incorporated and whether or not the townsite took in the ground involved in this present controversy?

A. The town was incorporated according to the provisions of our statute. It embraced, to my certain knowledge, because I have been around the boundaries, the tract of land now occupied by the N. C. stores, warehouses and wharves. Subsequently I secured another employment from the city council; after they were incorporated I was appointed townsite agent and procured for them a survey of the out boundaries of the town of Fairbanks for the purpose of purchasing it from the government and procuring a patent. I then again familiarized with the tract of land which we sought to purchase and procured a survey of the out boundaries to be made by a surveyor appointed by the surveyor-general of Alaska. That again included all of the land covered by the stores and warehouses and wharves of the Commercial Company. I then procured the appointment of a townsite trustee, Henry T. Ray, and attended to the proceedings, making entry and application for the purchase of the

land for townsite purposes, all of which was done and the patent was issued to Mr. Ray from the government, covering all the land embraced within the official boundaries surveyed for patent. That patent also embraced the land of the Northern Commercial Company and its warehouses and the wharves. In that connection, as attorney for the townsite trustee, it became important as I thought for me to ascertain whether the so-called Barnette Trading Post had ever been perfected, because there were rights which might conflict with the townsite trustee's application to enter, which should be investigated. I satisfied myself that all pretense of claiming under the trading site had been abandoned; in other words, it had never been perfected and was practically forgotten. And I satisfied myself too from the agents of the Northern Commercial Company here that they chose to take their title from the townsite trustee under the patent received by him, and that is about as far as I personally know."

Fifth. The place where located, and

Sixth. The nature and character of the structure.

Agreed statement of facts paragraph VI.

"That said defendant has a wharf and warehouse on the river bank in front of its said premises in Fairbanks aforesaid, at which steamboats owned by it, land and unload the freight belonging to the said defendant and its shippers; but that no wharfage charge, dockage charge or storage charge is made for freight so landed upon said wharf."

Seventh. Dedication to the public.

Agreed statement of facts paragraph VIII.

“That defendant does not accept goods on storage for hire, nor does it permit boats other than its own to land at its warehouses or docks for the purpose of unloading goods for hire.”

We respectfully submit that upon the foregoing argument and authorities the decision of the District Court was erroneous and should be reversed.

Respectfully submitted,

LLOYD S. ACKERMAN,

Attorney for Appellant.

No. 2294.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN COMMERCIAL COM-
PANY (a Corporation),

Plaintiff in Error and Appellant,

VS.

UNITED STATES OF AMERICA,

Defendant in Error and Appellee.

**Upon Writ of Error to, and Appeal from, United States
District Court for the District of Alaska, Fourth Judi-
cial Division.**

**BRIEF OF DEFENDANT IN ERROR AND
APPELLEE.**

**PARTS OF APPELLANT'S STATEMENT OF CASE CONTRO-
VERTED.**

The statement of the case made by counsel for appellant is hereby controverted in the following particulars:

First: He states on page 1 of his brief, that the case was submitted to the Court below upon an agreed statement of facts and a stipulation to submit the controversy without action, when in fact it was submitted to the Court below upon the agreed statement

of facts and stipulation and evidence taken at the trial.

Pp. 17 to 35 inclusive, and 47 to 52 inclusive,
Transcript of Record.

Second: He states on page 3 of his brief that it was stipulated that the docks, wharves and warehouses of appellant are private, when in fact there was no stipulation that such docks, wharves or warehouses were private, and the entire stipulation should be read and interpreted as a whole, to get the true sense thereof, and such reading and interpretation shows clearly that the government contends that such docks, wharves and warehouses are public.

Third: That the words "persons or" should be inserted between the words "by" and "corporations" in the third line of page 4 of appellant's brief.

Fourth: That no reference is made by counsel to paragraph IX of the stipulation which is particularly material in the case, and reads as follows:

"That a controversy has arisen between the parties hereto as to the construction of that portion of section 460 hereinbefore set out, the defendant contending that it should not be compelled to pay a license and fee of ten cents per ton on freight handled or stored by it, and the District Attorney representing the United States of America, in the Third Judicial Division of the District of Alaska, does not concede the correctness of the contentions made by defendant, and hereby consents that the controversy aforesaid be submitted to the court for construction, therefore it is consented by the parties hereto that the construction of said section may be submitted to the court for determination."

Pp. 6, 7, Transcript of Record.

Fifth: On page 4 of appellant's brief, it is stated that "upon the foregoing statement of facts the matter was referred by the Court to a referee to take "proofs," etc., when in fact it was upon the agreed statement of facts and the stipulation together with the evidence submitted at the trial of the case, after a jury had been waived, that the lower Court, Judges Cushman and Overfield sitting together on the bench, held that the appellant company was liable for the payment of such license tax, after which finding of liability the matter was referred to a referee.

ARGUMENT.

I.

WAS THE WHARF USED BY APPELLANT A PUBLIC WHARF SUCH AS TO BE SUBJECT TO THE LICENSE TAX UNDER THIS STATUTE?

What is meant in the Act by the term "public wharf?"

(A) Inapplicability of Authorities Quoted by Appellant.

Practically all of the authorities referred to by counsel for appellant in his brief, except *Sesnon vs. United States*, are civil cases, and do not touch license tax matters, nor the question of what constitutes a public wharf such as to make it liable to a license tax under this statute, and the *Sesnon* case supports the government's contention in the case at bar.

The case of *Spreckels Sugar Refining Co. vs. McLean*, 192 U. S. 397, 48 L. Ed. 496, referred to by appellant on pages 9, 10 and 11 of its brief, appears to us to have no application whatever to the case at bar, for in that cause the court was trying to determine the amount of tax that should be paid by the Sugar Refining Company on its gross annual receipts and there was no question of the Sugar Refining Company prosecuting the business of a public wharf on which there was a separate license tax as in this cause.

The case of *Dutton vs. Strong*, 1 Black. (U. S.) 35, 17 L. Ed. 29, referred to on page 14 of appellant's brief, was a civil suit and is not applicable to the case at bar since that was merely a question of the right of the owner of a vessel to tie up to the wharf owner's pier.

The case of *Transportation Co. vs. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584, referred to by appellant on pages 14 and 15 of its brief, was a civil suit involving merely the question of reasonable wharf charges.

The case of *Louisville R. Co. vs. West Coast etc. Co.*, 198 U. S. 483, 49 L. Ed. 1135, referred to by appellant on page 15 of its brief, is not applicable here since that was a civil case where the only question decided was that the wharf was not such a public wharf whose use could be demanded by shippers for the purpose of employing vessels of their own selection for the further carriage of their goods.

The case of *Potomac Steamboat Co. vs. Upper Potomac Steamboat Co.*, 109 U. S. 672, 27 L. Ed. 1070, referred to by appellant on page 16 of its brief, was

a civil case in which the rights of riparian proprietors only were decided.

The *Weems Steamboat Co. vs. People's Steamboat Co.*, 214 U. S. 345, referred to by appellant on pages 15, 16 and 17 of its brief, was a civil case in which there was no question considered as to the public character of the wharves used in the handling of freight for the general public.

The case of *Compton vs. Hawkins*, 90 Ala. 411, 24 Am. St. 923, referred to on pages 17 and 18 of appellant's brief, was a civil case involving only the right to store and deposit logs and timber at a landing place for the purpose of rafting. In that case the Appellate Court practically declared that the wharf was a public wharf for general public use, but not for the purpose of storing logs and timber for rafting, which was an unusual use demanded by the complainant.

(B) *Object of the Statute, and Its Construction.*

Congress may provide by direct legislation for a system of licenses for the support of local government in the territories, and the act in question is one for the support of local government, said act, approved June 6th, 1900, having superseded a former act of Congress enacted for the same purpose, approved March 3d, 1909.

In re Wynn-Johnson, 1 Alaska 630;

United States vs. Binns, 1 Alaska 553;

Binns vs. United States, 194 U. S. 486, 48 L. Ed. 1087;

Engleman vs. United States, 86 Fed. 456;

John J. Sesnon Co. vs. United States, 182 Fed.
576;
25 Cyc. 599.

This statute is a revenue statute, and is to be construed liberally and sensibly so as to carry out the purposes of the legislative intention in its enactment, which in this case was to raise revenue, and also so as to avoid an unjust or absurd conclusion.

John J. Sesnon Co. vs. United States, 182 Fed.
576;
Lau Ow Bew vs. United States, 144 U. S. 47,
p. 59; 36 L. Ed. 340, p. 344.

In this case at bar—which it might be mentioned is a test case upon the result of which others are awaiting—the government is only asking for the payment of the license tax on freight handled over the wharf of appellant, consigned to other shippers than itself, when I am inclined to the opinion, that under the law appellant could and should be required to pay a license tax on the freight shipped to itself and handled over this wharf, and it is admitted by appellant that it has never paid any of the license tax against which it protests.

John J. Sesnon Co. vs. United States, 182 Fed.
579;
Pp. 33 and 34, Transcript of Record.

This statute was in effect long before the wharf was built and used by the appellant company in its dealings with the public, and it is not shown con-

clusively that the appellant has a deed to the water front where its wharf is located on a navigable river.

Pp. 26 to 33 inclusive, Transcript of Record.

There is no evidence to show that the wharf business was included in the mercantile business of appellant for a mercantile tax, and the fact that appellant pays a mercantile tax is immaterial. The agreed statement of facts and the evidence, too, show clearly that appellant handled the freight of other shippers on the Fairbanks wharf and appellant could not under the statute, run this wharf business as incidental to its mercantile business any more than it could run its steamboats or a liquor shop as incidental to such business. It could not dovetail in this wharf business to avoid a public wharf license tax any more than it could a liquor license tax, nor can a steamboat company being a common carrier, construct or lease docks and thus evade the payment of this license tax when the patrons shipping over their lines constitute the public.

Brass vs. North Dakota, 153 U. S. 391, 38 L. Ed. 761.

The public wharf business is a thing to be taxed separate and distinct from the mercantile business.

Galveston Co. vs. Galveston Wharf Co., 10 S. W. 587;

Municipal Tel. etc. Co. vs. Ward, 135 Fed. 1006;

Western Express Co. vs. United States, 141 Fed. 28.

Appellant contends that the government is placed in a curious position on account of paragraph VII of the statement of facts, but paragraph VII must be read and interpreted together with all of the other paragraphs of the stipulation and it must be given a reasonable interpretation. Even the latter part of paragraph VII contradicts in a sense the fore part of the said paragraph. It was no doubt meant that appellant was not engaged alone in the business of maintaining public docks and wharves separate and distinct from its transportation business.

Any way, as under the statute, no officer of the United States has authority to dispense with the requirements of the law and the United States is not bound by any inadvertent acts or omissions of its officers in this respect.

Minturn vs. United States, 106 U. S. 445, 27 L. Ed. 210;

Hart vs. United States, 95 U. S. 316, 24 L. Ed. 479.

The question of whether the docks and wharves are conducted publicly was and is the question contended for by the government and decided in the affirmative by the two judges presiding in the Court below from the evidence and statement of facts, and that is one of the principal propositions to be decided here in this Court.

(C) *The Public Use of a Wharf by the General Public Who are Patrons of a Common Carrier, Makes it a Public Wharf Such as to Subject it to*

this License Tax for the Purpose of Raising Revenue for the Support of Local Government in the Territory.

Replying to appellant's argument in its brief on pages 18 to 22 inclusive as to the considerations which determine whether or not a wharf is public or private, I submit to the Court the following propositions which the government contends are fully supported by the law and the evidence:

(1) The wharf was built by the appellant company to carry on business for the public in its capacity as a common carrier for its shippers and itself.

Par. VI Stipulation, p. 6, Transcript of Record.

Pp. 19 to 26 inclusive, Transcript of Record.

(2) The wharf at Fairbanks has been used by the appellant company in its business as a common carrier for all shippers who apply—the public generally—and under its charter it did business with all comers and so the dock was put to public use and the cost of maintaining the dock was really charged up in the freight charges to pay the general cost of operating, although no separate charge for wharfage was made.

Pp. 24, 25, Transcript of Record;

Par. I Stipulation, p. 4, Transcript of Record;

Pp. 20 to 26 inclusive, Transcript of Record.

(3) The authority by which the wharf was erected was that the appellant is a corporation duly authorized by law under its charter to construct and otherwise dispose of wharves and it conducted this one at

Fairbanks as a public wharf as the stipulation and evidence clearly show.

Pp. 4 to 6 inclusive, Transcript of Record;
Pp. 20 to 26 inclusive, Transcript of Record.

(4) Even though the appellant company may own the soil where it built the wharf, it is still a public wharf when it is used to carry on business for the public in connection with itself as a common carrier, as is done here in the case at bar for all shippers who apply.

P. 26, Transcript of Record.

(5) and (6) This wharf is located on a navigable river, and although owned by the appellant company as its private property, is used as a public wharf by appellant in its business as a common carrier, even though no separate and distinct charges from the freight charges are made.

(7) The wharf is in effect dedicated to public use and becomes a public wharf when used by the appellant company as a common carrier of freight handled for all shippers who may apply.

Here the appellant company lands and handles freight over its wharf for a great many shippers who patronize its line of steamers, and its wharf has the same public character as its steamers have as common carriers.

Pp. 5, 6, and 22 to 26 inclusive, Transcript of Record.

Appellant puts in italics and calls particular atten-

tion to the latter part of the instruction of the trial court to the jury in the case of *John J. Sesnon vs. United States*, 182 Fed. 573, quoted on page 13 of its brief, in which the Court stated

“If they only landed freight for their own purposes, for their own uses, why then of course it would be a private wharf and would not be subject to a license.”

But in the case at bar the freight of other shippers was handled by appellant and the appellant company did not land and handle freight for its own uses and purposes *alone*, so as to make the wharf private as counsel for appellant would have you believe, for it landed and handled thousands of tons of freight for the purposes and uses of the many shippers who patronized its line of steamers and wharf, and thus the wharf became and is, a public wharf, and even though appellant did not make a separate and distinct charge of wharfage to those who shipped freight over its wharf and line of steamers, it is the use to which the wharf is put and not the charge, which makes it a public wharf, and it is freight handled, not charged for, that determines the amount of the license tax.

Brass vs. North Dakota, 153 U. S. 391, 38 L. Ed. 761;

John J. Sesnon Co. vs. United States, 182 Fed. 579.

The word “public” has two proper meanings. A thing may be said to be public when owned by the public, and also when its uses are public.

Missouri O. & G. Ry. Co. vs. State, 119 Pac.
119;
32 Cyc. 748.

Where property is devoted to a use in which the public has an interest, it is affected with a public use and is subject to regulation under the public power by the imposition of a license tax.

Munn vs. Illinois, 94 U. S. 113, 24 L. Ed. 77;
Budd vs. New York, 143 U. S. 517, 36 L. Ed.
252;
Brass vs. North Dakota, 153 U. S. 391, 38 L.
Ed. 761.

Any use of anything which will satisfy a reasonable public demand for public facilities, for travel or for transmission of intelligence or commodities, would be a public use and what is a public use is a judicial question.

In re Application Stewart, 33 L. R. A. 429.

Even though appellant claimed the wharf is used only for its own business and that other business is merely incidental, yet the dock is public, for it handled 21,900 tons of freight for other people as shown by the record.

Pp. 50 to 55 inclusive, Transcript of Record.

A wharf may be private or public though owned by an individual, and the use it has been put to at least furnishes a basis for an inference of the owner's intention in its construction and maintenance.

Thousand Island etc. Co. vs. Visger, 71 N. E. 765.

When private property is devoted to a public use, it is subject to public regulation and therefore to a license tax.

Munn vs. People of Ill., 94 U. S. 113, 24 L. Ed. 86;

Ryan vs. Louisville Co., 45 L. R. A. 306.

When appellant company makes its wharf public, that is, assumes to serve the public as in the case at bar for all shippers patronizing its steamers which are common carriers, then it dedicates its wharf to public use, and the wharf becomes a public wharf, subject to public regulation and control, and so subject to a license tax.

State vs. Edwards, 29 Atl. 947, 86 Me. 102.

This wharf is used and controlled by a corporation organized under the laws of New Jersey and doing a public business in Alaska as a common carrier.

Par. I Stipulation, pp. 4 and 26, Transcript of Record.

This wharf is the appellant company's terminal and is an indispensable instrumentality in its business as a common carrier, the Northern Commercial Company and the Northern Navigation Company, and is a public dock.

Budd vs. New York, 143 U. S. 517, 36 L. Ed. 252.

A common carrier operating a wharf on one of the highways of commerce is engaged in a public service and is subject to public regulation. The fact that no separate charge is made by appellant does not prevent the wharf from being a public wharf for the purposes of this case. There is, in fact, a consideration paid by all shippers, for freight handled over the appellant's wharf, in freight charges paid.

Pp. 24, 25, Transcript of Record;
Ryan vs. Louisville Co., 45 L. R. A. 303;
Munn vs. People of Ill., 94 U. S. 113.

The appellant company cannot pose as a common carrier with steamers devoted to public use and subject to carry freight for all who may apply, right up to the wharf landing, and then say this is a private wharf, although the general public's freight is handled over the said wharf from its steamers.

Budd vs. New York, 143 U. S. 517, 34 L. Ed. 252.

The appellant wants, of course, the protection of the laws, but it appears without assuming the burdens of taxation necessary to maintain the laws giving such protection.

Exemption from taxation is not favored by the law, and will not be sustained unless such clearly appears to have been the intent of the legislature and every reasonable doubt should be resolved in favor of the taxing power. Indeed, the taxing power of the State is never presumed to be relinquished and it exists unless the intention to relinquish it is declared

in clear and unambiguous terms admitting of no other reasonable construction and an exemption from taxation must be clearly defined, and founded on plain language without doubt or ambiguity.

Yazoo & Mississippi Valley R. R. Co. vs. Adams, 180 U. S. 1, 45 L. Ed. 395;
Southwestern Ry. Co. vs. Wright, 116 U. S., 231, 26 L. Ed. 626;
Bank of Commerce vs. Tennessee, 161 U. S. 134, 40 L. Ed. 145;
Chicago etc. Co. vs. Missouri, 120 U. S. 569, 30 L. Ed. 732;
Memphis etc. Co. vs. Taxing District, 109 U. S. 398, 27 L. Ed. 976.

Exemptions from taxation are regarded as in derogation of the sovereign authority and of the common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed *strictissima juris*.

Yazoo & Miss. etc. Co. vs. Thomas, 132 U. S. 174, 33 L. Ed. 302.

II

IS THIS CASE PROPERLY BEFORE THE COURT?

Counsel for the government contends that although there was a stipulation to submit to the District Court of Alaska the question of the liability of the appellants to pay this license tax, in which tribunal or a judge thereof, was vested the power to grant licenses, the proceeding was not a suit or action in which a final decree or judgment was rendered from which the

appellants could take an appeal or come up on writ of error to this Court or the Supreme Court. This proceeding was in effect an application for a license, coupled with a protest against being required to take out such a license and pay for the same, on the ground that it did not come within the provisions of the Alaska law, and its collection was therefore illegal. Furthermore, in the case at bar, we have a revenue statute imposing a license tax for the support of local government in the territory of Alaska, and the appellants have not paid any money in liquidation of such license tax. The statute of limitations, too, has been enlarged by the stipulation to submit the controversy to the lower Court, and the jurisdiction of the lower Court under the stipulated case, would not be affected, as judgment in the lower Court should be considered as final. Therefore, the order and judgment of the District Court should be confirmed.

Pacific Steam Whaling Co. vs. U. S., 187 U. S. 452, 47 L. Ed. 253, 6;

Corbus vs. Alaska Treadwell Co., 99 Fed. 334;

Taylor vs. Secor, 92 U. S. 613, 23 L. Ed. 673;

Patton vs. Brady, 184 U. S. 614, 46 L. Ed. 717;

Pp. 4 to 10 inclusive, 33, 34, 38 and 39, Transcript of Record.

III.

CONCLUSION.

This revenue statute referred to, creates a tax on practically every line of business, including public docks, wharves and warehouses, and since the term

“public warehouse” as used in the act must mean a warehouse where the goods, wares and merchandise of the public who have need of such accommodations are stored, it necessarily follows that the words “public wharf” used in the same clause, should be consistently construed and that construction should be limited here simply to the question of whether the freight handled over the wharf of appellant, was that of the general public, and that it was such a public wharf as to be subject to the license tax.

Upon the foregoing argument and authorities, the government’s contention is that the decision of the District Court was correct, and should be affirmed.

Respectfully submitted,

JAMES J. CROSSLEY,
United States Attorney.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

W. J. MORRISON, FINLEY MORRISON AND
SLIGH FURNITURE COMPANY, a corporation,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United
States for the District of Oregon.

TRANSCRIPT OF RECORD.

RECEIVED

JUL 28 1913

F. D. MONCKTON,
CLERK

FILED

AUG 2 - 1913

No.

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W. J. MORRISON, FINLEY MORRISON A N D
SLIGH FURNITURE COMPANY, a corporation,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

**Names and Addresses of Attorneys
upon this Appeal:**

For the Appellants:

R. Sleight, Yeon Bldg., Portland, Ore.

For the Appellee:

C. L. Reames, U. S. Atty., Portland, Ore.

INDEX

	Page
Amended Answer	8
Answer—Amended	8
Appeal—Petition for	52
Appeal—Order Allowing	54
Assignments of Error	55
Appeal—Bond on	57
Appeal—Citation on	59
Bill of Complaint	1
Bond on Appeal	57
Complaint—Bill of	1
Court—Opinion of the	19
Citation on Appeal	59
Clerk's Certificate	62
Defendant's Exhibit 1	40
Defendant's Exhibit 2	49
Defendant's Exhibit 3	50
Defendant's Exhibit 4	51
Decree	28
Exhibits "C"—Government's	36
Exhibits 1—Defendant's	40
Exhibits 2—Defendant's	49
Exhibits 3—Defendant's	50
Exhibits 4—Defendant's	51
Error—Assignments of	55
Exhibits—Order Certifying Up	61
Facts—Stipulation of	31
Government's Exhibits "C"	36
Order Allowing Appeal	54
Opinion of the Court	19
Order Certifying Up Exhibits	61

INDEX

	Page
Order Enlarging Time to File Transcript	62
Petition for Appeal	52
Replication	18
Stipulation of Facts	31
Transcript—Order Enlarging Time to File	62

*In the District Court of the United States for the
District of Oregon.*

Be It Remembered, That on the 24 day of November,
1911, there was duly filed in the Circuit Court of
the United States for the District of Oregon, a
Bill of Complaint, in words and figures as fol-
lows, to wit:

[Bill of Complaint.]

*In the Circuit Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON, and THE SLIGH FURNI-
TURE COMPANY, a corporation,

Defendants.

To the Honorable Judges of the Circuit Court of the
United States for the District of Oregon, Ninth
Judicial District: Sitting in Equity.

Comes now the United States of America by Robert
F. Maguire, its Assistant United States Attorney for
the District of Oregon, in this behalf duly authorized
and directed by the Attorney General of the United
States and brings this its bill against E. J. Cowlshaw,
a citizen and resident of the State of Oregon, W. J.
Morrison, a citizen and resident of the State of Ore-
gon, Finley Morrison, a citizen and resident of the
State of Oregon, and The Sligh Furniture Company,

a corporation incorporated under and by virtue of the laws of the State of Michigan, and a citizen and resident of said state, and shows unto Your Honors as follows:

I.

The Southwest Quarter, the Northwest Quarter, the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$), all of Section Sixteen (16), Township Three (3) South, Range Six (6) East of the Willamette Meridian, and each and every parcel thereof, are and have at all times been a part and parcel of the public domain of the plaintiff.

II.

On to-wit the 16th day of December, 1905, the Secretary of the Interior by proclamation withdrew temporarily from entry, settlement, sale or other disposal, except under the mining laws of the United States, all of said lands, together with large quantities of other lands of plaintiff's public domain contiguous to and in the vicinity thereof, for forest purposes.

III.

On the 25th day of January, 1907, the President of the United States, acting under and by virtue of the power vested in him by law, by executive proclamation established the Cascade Range Forest Reserve, Oregon, and included therein by said executive proclamation, each and every part, portion and parcel of said lands.

IV.

On January 2, 1902, a field survey of said land was made but said survey was not accepted and approved

by the Commissioner of the General Land Office of the United States until January 31, 1906, and at all times prior to the said 31st day of January, 1906, the said lands were unsurveyed, public lands of the plaintiff and part of its public domain.

V.

The plaintiff, the United States of America, claims and holds the title in fee to each and every of said parcels of land.

VI.

The defendant, E. J. Cowlshaw, claims an interest and estate in the Southwest Quarter (SW $\frac{1}{4}$) of Section Sixteen (16), Township Three (3) South, Range Six (6) East Willamette Meridian, of said lands, under, through and by virtue of a pretended certificate and contract from the State of Oregon, described as follows: Certificate No. 15210, dated January 8, 1907; and which said pretended claim, estate and interest, is without any right whatsoever, and the defendant E. J. Cowlshaw has no estate, right, title or interest whatsoever in said land or in said premises or any part thereof.

VII.

The defendants Finley Morrison and W. J. Morrison claim an estate and interest in the Southeast Quarter (SE $\frac{1}{4}$) of Section Sixteen (16), Township Three (3) South, Range Six (6) East Willamette Meridian, under, through and by virtue of a deed executed by Robert F. Loudon, which said deed is of date the 10th day of October, 1906, and pretends to convey to the said defendants last above named, the

Southeast Quarter ($SE\frac{1}{4}$) of said Section Sixteen (16) in said township and range, which said pretended claim, estate and interest, is without any right whatsoever, and the defendants Finley Morrison and W. J. Morrison, have not and neither of them have any estate, right, title or interest in said lands or premises or any part thereof.

VIII.

The defendants Finley Morrison and W. J. Morrison claim an estate and interest in the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Northwest Quarter of the Northwest Quarter ($NW\frac{1}{4}NW\frac{1}{4}$) of Section Sixteen (16), Township Three (3) South, Range Six (6) East Willamette Meridian, under and through a deed executed by Alvira S. Loudon, of date January 9, 1907, which said deed pretended to convey the said lands thereof to the said Finley Morrison and W. J. Morrison; and which said pretended claim, estate and interest is without any right whatsoever, and the defendants Finley Morrison and W. J. Morrison have not and neither of them have any estate, right, title or interest whatsoever in said land or premises or any part thereof.

IX.

The defendants Finley Morrison and W. J. Morrison claim an estate and interest in the South Half of the Northwest Quarter ($S\frac{1}{2}NW\frac{1}{4}$), and the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section Sixteen (16) in Township Three (3) South, Range Six (6) East of the Willamette Meridian, under, through and by virtue of a deed execut-

ed by Charles E. Powell, of date January 15, 1910; which said deed pretended to convey the said lands to the said Finley Morrison and W. J. Morrison, and which said pretended claim, estate and interest is without any right whatsoever, and the defendants Finley Morrison and W. J. Morrison have not and neither of them have any estate, right, title or interest in or to any part of the said lands last above described.

X.

The Sligh Furniture Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, claims an estate and interest in the Northwest Quarter of the Northwest Quarter ($NW\frac{1}{4}NW\frac{1}{4}$) and the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$), and the Southeast Quarter ($SE\frac{1}{4}$), all of Section Sixteen (16), Township Three (3) South, Range Six (6) East Willamette Meridian, through and under a deed executed by Finley and W. J. Morrison of date July 12, 1910, which said deed pretended to convey to the said The Sligh Furniture Company, the lands last above described, and which said pretended claim, estate and interest is without any right whatsoever and the defendant, The Sligh Furniture Company, has not any estate, right, title or interest in the said lands or premises or any part or parcel thereof.

XI.

The Act of Congress Approved February 14, 1859, provides in part, that

“Sections 16 and 36 of every township of

public lands in said state (Oregon), and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

XII.

The defendants and each and every one of them derive their claim or right, title, interest and estate in said lands, under and by virtue of the provisions of the Act of Congress hereinbefore recited, directly or by mesne conveyances, from the State of Oregon, and said claims and each and every of them is without any right whatsoever, for the reason that the said lands having been withdrawn from settlement, entry, sale or other disposal except under the mineral laws of the United States, before and prior to the survey of the same as hereinbefore set forth, no right, title, interest or estate in said lands, ever or at all vested in the said State of Oregon.

To the end, therefore, that your plaintiff may have that relief which can only be obtained in a court of equity and in this court having jurisdiction under the aforesaid facts, and that the defendants may answer the premises and show, if they can, why plaintiff should not have the relief herein prayed for, your plaintiff prays and requests of Your Honors to grant your plaintiff a writ of subpoena to be directed to the said defendants, commanding them at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and

then and there full, true, direct and perfect answer make (but not under oath, the benefit whereof is hereby expressly waived) to all and singular the premises and to stand, perform and abide by such order, direction and decree as may be made against them or either of them in the premises as to Your Honors shall seem meet and agreeable to equity, and that Your Honors may decree that the title of the plaintiff in and to the said lands and each and every part, portion and parcel thereof, is good and valid; that the defendants and each and every of them have no right, title, interest or estate therein to the said lands or any part, portion or parcel thereof; that the **contracts of sale, certificates, deeds and other conveyances and muniments of title, under, through and by virtue of which the said defendants and each of them claim any estate, right, title or interest in said lands, be cancelled, vacated and held for naught and that the defendants and each of them be forever enjoined and debarred from asserting any claim whatsoever in or to the said lands or any part, portion or parcel thereof, adversely to the plaintiff, and for such relief as to Your Honors shall seem meet and agreeable to equity and for its costs and disbursements.**

ROBERT F. MAGUIRE,
Assistant United States Attorney
for the District of Oregon.

UNITED STATES OF AMERICA,
District of Oregon.—ss.

I, Robert F. Maguire, being first duly sworn, on oath depose and say that I am Assistant United

States Attorney for the District of Oregon, and that the facts set forth in the foregoing bill of complaint are true as I verily believe; that I base this affidavit upon the record in said cause as is furnished and delivered to me by the Department of Agriculture and by authority and under the direction of the Attorney General of the United States.

ROBERT F. MAGUIRE,
Assistant United States Attorney
for the District of Oregon.

Subscribed and sworn to before me this 23d day of November, 1911.

F. L. BUCK,
(L. S.) Notary Public for Oregon.

[Endorsed]: Bill of Complaint. Filed November 24, 1911.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 5 day of January, 1913, there was duly filed in said Court, an Amended Answer, in words and figures as follows, to wit:

[Amended Answer.]

*In the Circuit Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON, and the SLIGH FURNITURE
COMPANY, a corporation,
Defendants.

The joint and several amended answer of W. J. Morrison, Finley Morrison and the Sligh Furniture Company, a corporation, to the bill of complaint of the above named plaintiff respectfully shows as follows:

I.

Answering paragraph I of said bill of complaint these defendants deny that the lands therein described are or were at any of the times mentioned in the bill of complaint a part of the public domain of the United States.

II.

Answering paragraph II of said bill of complaint these defendants admit that on the 16th day of December, 1905, the Secretary of the Interior by proclamation temporarily withdrew from entry, settlement, sale or other disposal, except under the mining laws of the United States, all of the lands described in paragraph I of the bill of complaint, together with other lands belonging to the plaintiff, for forest purposes; but allege that such withdrawal was subject to the rights acquired by these defendants in the lands claimed by them as hereinafter set forth, and also was by the terms of the proclamation or order withdrawn by description according to the subdivisions of the survey hereinafter mentioned.

III.

Answering paragraph III of the bill of complaint these defendants admit that on the 25th day of January, 1907, the President of the United States by executive proclamation established the Cascade Range

Forest Reserve in Oregon and included therein the lands described in said bill of complaint; but allege that in so far as the lands claimed by these defendants is concerned, which lands are hereinafter particularly described, the same was subject to the rights acquired by these defendants from the State of Oregon as hereinafter set forth.

IV.

Answering paragraph IV of said bill of complaint these defendants admit that on January 2, 1902, a field survey of the lands described in the bill of complaint, including the lands claimed by these defendants as hereinafter described, was made and that said survey was accepted by the Commissioner of the General Land Office on January 31, 1906; but deny that prior to said last mentioned date the said lands, or any part thereof, were unsurveyed lands, or were public lands belonging to the United States, or a part of the public domain, and allege that the said lands had been acquired by these defendants from the State of Oregon as hereinafter described.

V.

Answering paragraph V of the bill of complaint these defendants deny that the United States holds the title to the lands described in the complaint, including the lands claimed by these defendants as hereinafter described, and allege that the title to said lands last mentioned is now in the defendant the Sligh Furniture Company, which title was derived as hereinafter set forth.

VI.

Answering paragraph VI of the bill of complaint as to the claim of the defendant E. J. Cowlishaw to the Southwest Quarter of Section Sixteen these defendants have no knowledge or information thereof sufficient to form a belief, and these defendants disclaim any interest in said Southwest Quarter of Section Sixteen in Township Three South of Range Six East of Willamette Meridian.

VII.

Answering paragraph VII of said bill of complaint these defendants admit that the defendants Finley Morrison and W. J. Morrison acquired an estate and interest in the Southeast Quarter of Section Sixteen, Township Three South of Range Six East of Willamette meridian under color of title from Robert E. Loudon, which interest was subsequently conveyed to the Sligh Furniture Company as is hereinafter more particularly set forth, and these defendants deny that the said claim is without any right, and deny that they have not a good title thereto.

VIII.

Answering paragraph VIII of said bill of complaint these defendants admit that the defendants Finley Morrison and W. J. Morrison claim an estate and interest in the South half of the Northeast Quarter and the Northwest Quarter of the Northwest Quarter of said Section Sixteen in Township Three south of Range Six East of Willamette meridian under color of title acquired through Alvira S. Loudan, as is hereinafter more particularly set forth, and deny that the

claim and estate is without any right and deny that said defendants Finley Morrison and W. J. Morrison have not good title thereto.

IX.

Answering paragraph IX of said bill of complaint these defendants and each of them do not claim and never have claimed to have any right, interest or estate in the south half of the Northwest Quarter or in the Northeast Quarter of the Northwest Quarter of Section Sixteen in Township Three south of Range Six East of Willamette meridian embraced in said paragraph IX of the bill of complaint, and they disclaim any interest therein.

X.

Answering paragraph X of said bill of complaint these defendants admit that the Sligh Furniture Company, the defendant corporation above named, is organized under the laws of the State of Michigan and admit that it claims an interest and estate in the Northwest Quarter of the Northwest Quarter and the South half of the Northeast Quarter and the entire Southeast Quarter of said Section Sixteen in Township Three south of Range Six East of Willamette meridian, which estate is derived through the said Finley Morrison and W. J. Morrison from the State of Oregon as hereinafter more particularly set forth, and deny that said estate and interest is without any right, and deny that the said Sligh Furniture Company has not any title to said lands or any part thereof.

XI.

Answering paragraph XI of said bill of complaint these defendants admit that the Act of Congress approved February 14, 1859, provided as set forth in paragraph XI.

XII.

Answering paragraph XII of said bill of complaint these defendants admit that as to all of the lands particularly described above, except those to which they disclaim any title, they derived their claim of title directly or by mesne conveyances from the State of Oregon, and deny that said claims or any of them are without right, and deny that said lands have been withdrawn from settlement, entry, sale, or other disposal except under the mineral laws of the United States before or prior to the survey of the same, but allege that said withdrawal was subject to the title of the State of Oregon theretofore acquired as hereinafter set forth.

XIII.

Further answering said bill of complaint these defendants allege and show to the court that the said Section Sixteen in Township Three South of Range Six East of Willamette meridian was granted to the State of Oregon by the United States by the terms of the Act of Congress approved February 14, 1859, for the use of schools, which grant was duly accepted by the State of Oregon by act of the legislative assembly of the State of Oregon approved June 3, 1859.

XIV.

That on January 2, 1902, a field survey of said Ses-

tion Sixteen was made under the direction of the Surveyor General of the State of Oregon in conformity with the laws of the United States, which survey was duly approved by said Surveyor General of the State of Oregon on the 2d day of June, 1903, and plats thereof were duly filed as provided by law. That the plat of said survey as approved by the Surveyor General was accepted by the Commissioner of the General Land Office on the 31st day of January, 1906, without any correction or change of any kind and in exactly the same form as approved by said Surveyor General.

XV.

That on the 16th day of December, 1905, by an order of the Secretary of the Interior the vacant and unappropriated land in said Section Sixteen was temporarily withdrawn from all disposal except under the mining laws. That on December 19, 1905, a telegram was sent by the Commissioner of the General Land Office to the Register and Receiver at Portland, Oregon, informing them of said withdrawal and stating that the land had been withdrawn for forestry purposes, and on December 19, 1905, a letter was sent by the Commissioner to the Register and Receiver giving them the same information. That the said withdrawal so made by said Secretary and Commissioner described said lands by government subdivision according to the rectangular system of government survey, and were based on said survey approved by the Surveyor General of Oregon as aforesaid.

XVI.

On January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve to include certain additional lands, which included the said Section Sixteen, but excepting from the force and effect of said proclamation all lands which at said date were embraced in any withdrawal or reservation for any use or purpose to which said reservation for forest uses is inconsistent. That the said withdrawal and proclamation was inconsistent with the use of the said lands for school land by the State of Oregon and inconsistent with the grant of said lands to the State of Oregon for said uses theretofore made as above set forth, and was inconsistent with the reservation of said lands for said uses as embraced in and covered by said grant. That the said proclamation and withdrawal by the Department are the proclamation and withdrawal mentioned in the bill of complaint.

XVII.

That by virtue of the said grant of Section Sixteen to the State of Oregon and by virtue of the said survey of said lands in the field and the approval thereof by the Surveyor General and the filing and approval thereof as hereinbefore set forth, the title to said lands vested in the State of Oregon beyond the power of the Department or of the President or of Congress to interfere with or deprive the state of the same, and the State of Oregon acquired the full right of disposal of said lands thereby.

XVIII.

That on the 10th day of October, 1906, the State of Oregon, in pursuance of the law of said state for the disposal of said lands, executed and delivered a certificate of sale to the Southeast Quarter of said Section Sixteen to Robert F. Loudon, and executed and delivered a certificate of sale of the South half of the Northeast Quarter and the Northwest Quarter of the Northwest Quarter of said Section Sixteen to Alvira S. Loudon; and the said Robert F. Loudon and Alvira S. Loudon thereafter duly assigned and transferred said certificate of sale to the defendants Finley Morrison and W. J. Morrison, and on the 9th day of January, 1907, the said Finley Morrison and W. J. Morrison duly surrendered said certificates to the State of Oregon in conformity with law, and the State of Oregon on said last mentioned date by its proper officers duly executed and delivered to said Finley Morrison and W. J. Morrison a deed of conveyance whereby it granted to them the Southeast Quarter and the South half of the Northeast Quarter and the Northwest Quarter of the Northwest Quarter of said Section Sixteen in Township Three south of Range Six East of Willamette meridian, subject to right of way for ditches, canals and reservoir sites for irrigation purposes constructed, or which may be constructed, by authority of the United States; and said defendants Finley Morrison and W. J. Morrison thereby acquired a fee simple title to said real estate and became the owners thereof. That the said deed was duly recorded in the office of the Recorder of

Deeds for Clackamas County, Oregon, which is the county in which said lands are situated, on the 26th day of January, 1907, and was also recorded in Book 32 of State Deed Records at Salem, Oregon, on page 420.

XIX.

That thereafter, to-wit: on the 12th day of July, 1910, the said Finley Morrison and W. J. Morrison and their wives by deed duly granted and conveyed the said last described lands to the Sligh Furniture Company, a corporation, which deed was recorded in the Recorder's office for Clackamas County, Oregon, on the 3d day of August, 1910, and said Sligh Furniture Company thereby became the owner of said lands in fee simple, and is now the owner thereof.

WHEREFORE these defendants pray that this suit may be dismissed and that they have and recover their costs and disbursements herein.

R. SLEIGHT,
Attorney for defendants
Finley Morrison, W. J. Mor-
rison and Sligh Furniture
Company.

[Endorsed]: Amended Answer of Defendants W. J. Morrison, Finley Morrison and Sligh Furniture Co. Filed Jan. 5, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 20 day of January, 1912, there was duly filed in said Court, a Replication, in words and figures as follows, to wit:

[Replication.]

*In the District Court of the United States for the
District of Oregon.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON, and THE SLIGH FURNI-
TURE COMPANY, a corporation,

Defendants.

Replication of the plaintiff in the above entitled cause to the answer of the defendants W. J. Morrison, Finley Morrison, and the Sligh Furniture Company.

Comes now the United States of America, plaintiff in the above cause, and replying to the answer filed herein says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say that this bill is true and sufficient as averred; and that he is ready to prove it, and that the answer of the defendant is untrue and insufficient.

WHEREFORE he prays relief as set forth in his original bill.

ROBERT F. MAGUIRE,

Solicitor.

[Endorsed]: Replication. Filed Jan. 20, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 13 day of January, 1913, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[Opinion of the Court.]

No. 3866.

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON and THE SLIGH FURNI-
TURE COMPANY (a Corporation),

Defendants.

John McCourt, United States Attorney,
Robert F. Maguire, Assistant United States Attorney.

R. Sleight for Defendants.

Wolverton, District Judge:

This is a suit to quiet the title to certain lands in the plaintiff against the claim of ownership and right to possession of the defendants. The lands are a part of School Section No. 16, in Township 3 South, Range 6 East of the Willamette Meridian. The facts as stipulated by counsel are as follows:

Prior to May 27, 1902, the lands were unsurveyed lands of the United States. On that date a field survey of the east boundary of said lands was made, and on June 2nd the north, west and south boundaries were surveyed, and section 16 subdivided according to the rules of the Land Office in surveying the lands of the Government. This field survey was approved by the United States Surveyor General of the State of Oregon June 2, 1903, and on June 8th that officer

transmitted copies of the plat of survey and field notes to the Commissioner of the General Land Office at Washington, D. C., and the survey was accepted by the Commissioner January 31, 1906. On November 16, 1907, the Commissioner directed the Surveyor General to place a plat of the survey in the field in the local land office of the United States at Portland, Oregon, which was on the same date accordingly filed in that office. On December 16, 1905, the Secretary of the Interior, by order, temporarily withdrew for forestry purposes, from all forms of disposition whatsoever except under the mineral laws of the United States, all vacant and unappropriated public lands within a certain specifically described area including said Township 3 South, Range 6 East, W. M., and the local land office was duly notified of such order. On January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve to include such lands, which, among other things, provided that all lands which at said date were embraced within any withdrawal or reservation for any use or purpose to which said reservation for forest uses was inconsistent were excepted from the force and effect of such proclamation.

On October 10, 1906, the State of Oregon, in pursuance of the laws for the disposal of lands owned by it, executed a certificate of sale to Robert F. Loudon for the Southeast quarter of said section 16, and to Alvina S. Loudon a certificate for the South half of the Northeast quarter and the Northwest quarter of the Northwest quarter of said section; and they there-

after assigned and transferred said certificates of sale to Finley and W. J. Morrison. On January 9, 1907, the State of Oregon, on surrender of the certificates of sale, executed to these latter purchasers a deed granting and conveying to them the lands described. On July 12, 1910, Finley and W. J. Morrison conveyed to the defendant Sligh Furniture Company.

Under the facts as thus stipulated, it is claimed by the Government that at the time the State exercised authority to sell and dispose of such lands, they were not school lands, but were the property of the Government, and not subject to sale by the State. The defendants controvert this position, and claim to have acquired the fee simple title in regular course. The question thus presented depends upon the proper construction of the clause in the Enabling Act of Congress for the admission of the State of Oregon into the Union, approved February 14, 1859, pertaining to school lands, which reads as follows:

“That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools.”

The grant was accepted by the Legislative Assembly of the State June 3, 1859. The language of the act is “Shall be granted.” This has never been construed, that I am aware of, as a grant in praesenti, but it rather looks to the future, as depending on some future act or event, and as not to become effective

until such act or event has taken place or happened. It is manifest that the act is not a grant of all sections 16 and 36 within the territorial limits of the State, for it provides that if such sections, or any part thereof, have been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted. This again raises the inquiry as to when the grant is to become effective as an actual transfer of the lands to the State. As to the lands to be granted in the place of the school sections, or any part thereof, sold or otherwise disposed of, it is very plain that there could be no passing of title until they were identified by some approved method of selection from the public domain. In construing a similar statute—the Enabling Act of the State of Nevada, which employed the words “shall be and are hereby granted”—the Supreme Court was led to observe that:

“Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted.”

Heydenfeldt v. Daney Gold, etc. Co., 93 U. S. 634, 638.

In that case the State of Nevada issued a patent to

plaintiff's predecessor July 14, 1868. The defendant claimed under a patent from the United States issued March 2, 1874, under the Act of Congress of July 26, 1866, as amended by an act approved July 9, 1870, and the act of May 10, 1872, relating to the development of the mining resources of the United States. The land in controversy was mineral land, and the defendant's grantors and predecessors had entered upon the same for mining purposes in 1867, prior to the survey or approval of the survey of the school section in which it was located, and had claimed the same in conformity with the laws and customs of miners in that locality. The Enabling Act for the admission of the State into the Union was adopted March 21, 1864. So it appears that in case that the land in dispute was entered upon for mining purposes subsequent to the adoption of the Enabling Act, at a time prior to a survey of the school section, but before the grant by the State to plaintiff's predecessor, and the question was fairly presented whether the title passed to the State at the time of its admission into the Union, or at some future time, namely, the time of its identification in place by a proper survey. And it was held that "Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality."

In an earlier case it was said, the court speaking

with reference to the Enabling Act of the State of Michigan, almost identical in language with that of Oregon:

“We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others.”

Cooper v. Roberts, 18 How. 173, 179.

In a later case, *Minnesota v. Hitchcock*, 185 U. S. 373, the court treated of the significance of the words “public lands,” and quoted as authoritative the language of the court in *Hewhall v. Sanger*, 92 U. S. 761, 763, as follows:

“The words ‘public lands’ are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.”

It then, after citing other authorities bearing upon the subject, proceeded to say:

“Again, the language of the section” (referring to the Minnesota Enabling Act, identical with that of Oregon as to the grant of school lands) “does not

imply a grant in praesenti. It is 'shall be granted.' Doubtless under that promise whenever lands became public lands they came within the scope of the grant."

Later the court further commented:

"But while this is true it is also true that Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the Government within the State, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the State shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which give it equivalent sections."

This was followed further in the opinion by a citation of the Heydenfeldt case, indicating its holding, namely, "that the United States had full power to dispose of the land until after a survey and the identification thereby." Then, after referring to a joint resolution adopted by Congress on March 3, 1857, prompted by a memorial from the Territory of Minnesota, the court concluded that:

"The act of admission with its clause in respect to school lands was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the State. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof."

It would seem to be a logical deduction from these authorities, therefore, that the grant of the school sections does not vest the title thereof in the State until they have become identified through a survey determining their location. In further support of this view see also *Hibberd v. Slack*, 84 Fed. 571, and *State of Oregon, L. D.*, decided July 5, 1912.

As to the case of *Beecher v. Wetherby*, 95, U. S. 517, there may be found expressions in the opinion seemingly opposed to this view, but the case itself does not appear to have been so considered by the Supreme Court in the *Hitchcock* case, although commented upon at some length. Furthermore the case was decided subsequent to the *Heydenfeldt* case, with but a year intervening, and, although cited in the briefs of counsel, it was not referred to in the opinion of the court, so that we cannot infer that it was the intention to overrule that case.

The next question presented is whether a survey in the field is sufficient to meet the requirements of an identification of school sections by survey. That the Land Department has authority to make rules and regulations, subject to law, in all matters pertaining

to the disposition of public lands, will not be questioned. And it is said that, "From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior." Citing Rev. Stat. Sec. 453.

Cragin v. Powell, 128 U. S. 691, 697.

See also *Knight v. U. S. Land Association*, 142 U. S. 161, 177.

In the exercise of this power the Land Department, on April 17, 1879, issued instructions to the Surveyors General that they should not file the duplicate plats in the local land offices until the duplicates had been examined in the General Land Office and approved, and the Surveyors General officially notified of that fact. Since such regulation it has been held by the Secretary of the Interior, and it has become the practice of the Land Department, that public lands are not to be deemed surveyed or identified until approval of the plat of survey and filing thereof by direction of the Commissioner of the General Land Office in the local land office. *F. A. Hyde & Co.*, 37 L. D. 164, 165.

This ruling has been specifically reaffirmed in a later case. *Anderson v. State of Minnesota*, 37 L. D. 390, 392. See also *State of Oregon*, L. D. 259, *supra*.

The Land Department having adopted such a rule under clear authority of law, and having so interpreted it, and it having the stamp of reason and sound policy, there is little left for the courts to do but to apply it.

In the case at bar the stipulation shows that, measured by this rule, there was no survey or proper identification of School Section No. 16, Township 3 South, 6 East, at the time the land was incorporated into the Cascade Reserve through withdrawal by the Commissioner, followed later by the proclamation of the President. Nor do I think that the lands in dispute were excepted from the operation of the proclamation.

The plaintiff is entitled to the relief as prayed, and it is so ordered.

[Endorsed]: Opinion. Filed Jan. 13, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 17 day of March, 1913, there was duly filed in said Court, a Decree, in words and figures as follows, to wit:

[Decree.]

*In the District Court of the United States for the
District of Oregon.*

No. 3866.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON, and the SLIGH FURNITURE
COMPANY, a corporation,

Defendants.

This cause came on to be heard and was argued by counsel appearing for the Plaintiff and the defendants, W. J. Morrison, Finley Morrison, and the Sligh Furniture Company, a corporation, a statement of facts having been agreed upon by the parties plaintiff and defendant, by their respective counsel, and filed herein;

And it appearing to the Court that a subpoena in the above entitled cause was duly issued and served on E. J. Cowlshaw, defendant herein, and that no appearance has been entered by the said E. J. Cowlshaw, and that an order taking the bill as confessed was duly entered in the order book on the 6th day of February, 1913, in the office of the Clerk of the Court, and no proceeding has been taken by the said defendant, E. J. Cowlshaw, since the entry of said order, and more than thirty days have elapsed since entering the order pro confesso against the said E. J. Cowlshaw;

WHEREUPON, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to the relief as prayed in its bill of complaint, viz:

That plaintiff's title to the Southwest Quarter ($SW\frac{1}{4}$), and the Northwest Quarter ($NW\frac{1}{4}$), and the South Half ($S\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$), and the Southeast Quarter ($SE\frac{1}{4}$), of Section Sixteen (16), Township Three (3) South, Range Six (6), East of the Willamette Meridian, in the State of Oregon, and to every part and parcel thereof, is

In the case at bar the stipulation shows that, measured by this rule, there was no survey or proper identification of School Section No. 16, Township 3 South, 6 East, at the time the land was incorporated into the Cascade Reserve through withdrawal by the Commissioner, followed later by the proclamation of the President. Nor do I think that the lands in dispute were excepted from the operation of the proclamation.

The plaintiff is entitled to the relief as prayed, and it is so ordered.

[Endorsed]: Opinion. Filed Jan. 13, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 17 day of March, 1913, there was duly filed in said Court, a Decree, in words and figures as follows, to wit:

[Decree.]

*In the District Court of the United States for the
District of Oregon.*

No. 3866.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON, and the SLIGH FURNITURE
COMPANY, a corporation,

Defendants.

This cause came on to be heard and was argued by counsel appearing for the Plaintiff and the defendants, W. J. Morrison, Finley Morrison, and the Sligh Furniture Company, a corporation, a statement of facts having been agreed upon by the parties plaintiff and defendant, by their respective counsel, and filed herein;

And it appearing to the Court that a subpoena in the above entitled cause was duly issued and served on E. J. Cowlshaw, defendant herein, and that no appearance has been entered by the said E. J. Cowlshaw, and that an order taking the bill as confessed was duly entered in the order book on the 6th day of February, 1913, in the office of the Clerk of the Court, and no proceeding has been taken by the said defendant, E. J. Cowlshaw, since the entry of said order, and more than thirty days have elapsed since entering the order pro confesso against the said E. J. Cowlshaw;

WHEREUPON, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to the relief as prayed in its bill of complaint, viz:

That plaintiff's title to the Southwest Quarter ($SW\frac{1}{4}$), and the Northwest Quarter ($NW\frac{1}{4}$), and the South Half ($S\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$), and the Southeast Quarter ($SE\frac{1}{4}$), of Section Sixteen (16), Township Three (3) South, Range Six (6), East of the Willamette Meridian, in the State of Oregon, and to every part and parcel thereof, is

good and valid; that the defendants, E. J. Cowlshaw, W. J. Morrison, Finley Morrison, and The Sligh Furniture Company, a corporation, and each and every of them, have no right, title, interest or estate therein to the said lands or any part, portion or parcel thereof; that the contracts of sale, certificates, deeds and other conveyances and muniments of title, under, through and by virtue of which the said defendants and each of them claim any estate, right, title or interest in said lands, be cancelled, vacated and held for naught, and that the defendants and each of them be forever enjoined and debarred from asserting any claim whatsoever, in or to said lands, or any part, portion or parcel thereof, adversely to the plaintiff; and,

IT IS FURTHER ORDERED AND ADJUDGED that the complainant herein recover its costs and disbursements in this suit, of and from the defendants, taxed at \$78.68.

Done and dated at Portland, Oregon, this 15 day of March, 1913.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Decree. Filed March 17, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of April, 1912, there was duly filed in said Court, a Stipulation of Facts, in words and figures as follows, to wit:

[**Stipulation of Facts.**]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON and the SLIGH FURNITURE
COMPANY, a corporation,

Defendants.

IT IS HEREBY STIPULATED by and between the above named plaintiff and the defendants, W. J. Morrison, Finley Morrison and the Sligh Furniture Company, that the following Statements of Facts is hereby admitted to be true for the purposes of all trials of this action, and of any and all appeals or other proceedings herein, no proof need be offered or produced by either of said parties upon such trial or appeal as to any of said facts, but the Court shall be at liberty to draw the same inference therefrom which might be drawn from the same facts if they were established by evidence.

IT IS FURTHER STIPULATED that either of said parties shall have the right to object to the competency, relevancy or materiality of any of the facts herein stipulated or any part thereof. And either of said parties shall also have the right to introduce and offer testimony or proof in addition to the facts herein stipulated, and not inconsistent with this stipulation.

I.

That the above named defendants, W. J. Morrison and Finley Morrison are citizens and residents of the State of Oregon, and The Sligh Furniture Company is a corporation organized and existing under the laws of the state of Michigan, and a citizen and resident of Michigan.

II.

The Act of Congress approved February 14, 1859, provides in part that:

“Sections 16 and 36 of every township of public lands in said state (Oregon), and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools.”

Said Act and grant was accepted by the State of Oregon by the Act of the Legislative Assembly of that State, Approved June 3, 1859.

III.

Prior to the 27th day of May, 1902, no survey of any kind had been made by the United States of the lands which are the subject of this suit. On the 27th of said lands was made under the direction of the United States Surveyor General of the State of Oregon, and on the 2d day of June, 1902, a field survey under the direction of the same official was made of the north, west and south boundaries, and the subdivisions of said lands, and according to the terms of the said field survey, the lands

which are the subject of this suit were and are described as Section sixteen (16) in township three (3) south, range six (6) east of the Willamette Meridian; that said field survey was approved by the United States Surveyor General for the State of Oregon on the 2d day of June, 1903, and that on the 8th day of June, 1903, the said Surveyor General transmitted copies of the plat of survey and field notes to the Commissioner of the General Land Office, Washington, D. C.; the said survey was accepted by the Commissioner of the General Land Office on the 31st day of January, 1906. On November 16, 1907, the Commissioner of the General Land Office directed the said Surveyor General to place a plat of the said survey in the field, in the local land office of the United States at Portland, Oregon; that said survey was accepted by the Commissioner of the General Land Office on January 31, 1906, and was filed in the local land office of the United States at Portland, Oregon, on the 16th day of November, 1907, in substantially the same form in which the same was accepted by the said Surveyor General, without change or correction thereof.

IV.

That on the 16th day of December, 1905, the Secretary of the Interior by an order of that date, temporarily withdrew for forestry purposes from all forms of disposition whatsoever except under the mineral laws of the United States all the vacant and unappropriated public lands within the areas specifically described in that certain letter of the Com-

missioner of the General Land Office, of date December 12, 1905, to the Secretary of the Interior, including all of Township three (3) south, range six (6) east of the Willamette Meridian. In December, 1905, a telegram was sent by the Commissioner of the General Land Office to the Register and Receiver of the United States Land Office at Portland, Oregon, informing him of said withdrawal and stating that the land had been withdrawn for forestry purposes and on December 19, 1905, a letter was sent by the said commissioner to the Register and Receiver, giving him the same information, copies of which said letters, orders and telegrams are hereby attached, hereby made a part hereof and marked Exhibit "A"; that the said withdrawal so made by the Secretary of the Interior and the Commissioner of the General Land Office described said lands according to the rectangular system of government survey.

V.

On January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve to include said lands in addition to those theretofore embraced in said reserve, which enlargement included the said section sixteen (16); that by said proclamation, it was provided that all lands which at said date were embraced in any withdrawal or reservation for any use or purpose to which said reservation for forest uses was inconsistent were excepted from the force and effect of said proclamation. That the said proclamation and withdrawal is the proclamation and withdrawal mentioned

in the Bill of Complaint and the amended answer of the defendants, W. J. Morrison, Finley Morrison and the Sligh Furniture Company, a copy of which said proclamation is hereto attached and hereby made a part hereof, and marked Exhibit "B".

VI.

That on the 10th day of October, 1906, in pursuance of the laws of Oregon providing for the disposal of lands owned by said state, the State of Oregon executed and delivered a certificate of sale of the southeast quarter of said section sixteen (16) to Robert F. Loudon, and executed and delivered a similar certificate of sale of the south half of the northeast quarter and the northwest quarter of the northwest quarter of said section sixteen (16) to Alvina S. Loudon, and the said Robert F. Loudon and Alvina S. Loudon thereafter duly assigned and transferred said certificates of sale to the defendants, Finley and W. J. Morrison and on the 9th day of January, 1907, the said Finley Morrison and W. J. Morrison surrendered said certificates to the State of Oregon in conformity with law, and the State of Oregon on said last mentioned date, by its proper officers, executed and delivered to the said Finley Morrison and W. J. Morrison a deed of conveyance whereby it granted and conveyed to them the southeast quarter and the south half of the northeast quarter and the northwest quarter of the northwest quarter, of said section sixteen (16) in township three (3) south, range six (6) east, Willamette Meridian, in the State of Oregon, subject to right of way for ditches, canals and reservoir sites

for irrigation purposes, constructed or which might be constructed by authority of the United States; that said deed was recorded in the office of the Recorder of Deeds for Clackamas County, Oregon, which is the county where said lands are situated, on the 26th day of January, 1907, and was also recorded in book 32 of State Deed records at Salem, Oregon, on page 420.

VII.

That on the 12th day of July, 1910, the said Finley Morrison and W. J. Morrison with their wives, executed and delivered a warranty deed of said premises conveying the same to the Sligh Furniture Company, a corporation, which deed was recorded in the Recorder's office of Clackamas County, Oregon, on the 3d day of August, 1910.

ROBERT F. MAGUIRE,
Assistant United States Atty.
and Atty. for Plaintiff.

R. SLEIGHT,
Atty. for dfts. W. J. and Finley
Morrison & Sligh Furniture Co.

[Endorsed]: Stipulation of Facts. Filed Apr. 30,
1912.

A. M. CANNON,
Clerk U. S. District Court.

[Government's Exhibit C.]

"B"		Forest Service
M. F. N.	4-207r	District 6.

RECEIVED

May 6, 1912.

Referred to Law Officer

DEPARTMENT OF THE INTERIOR

General Land Office

Washington

April 29, 1912.

I hereby certify that the annexed copy of letter dated February 28, 1906, is a true and literal exemplification from the press-copy of letter in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed by name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

(seal)

H. A. Campel,

Recorder of the General Land Office.

Filed Jun. 25, 1912.

A. M. Cannon,

Clerk U. S. District Court.

1905

158648

W.L.K.

“R”

J.M.P.

DEPARTMENT OF THE INTERIOR,

General Land Office,

Washington, D. C.,

February 29, 1906.

Address Only

The Commissioner of the

General Land Office.

The Honorable

The Secretary of the Interior.

Sir:

On January 31, 1905, Adolf Aschoff, Forest Super-

visor, northern division of the Cascade Range Forest Reserve, Oregon, reporting to this office relative to the status of the E½ of Sec. 36, Tp. 9 S., R. 5 E., W. M., after examination, states that said land is now owned by the Curtis Lumber Company, by purchase from one Tom Edison; that the improvements found thereon consist of a one-room hemlock log cabin with one door, one window, shake roof and puncheon floor; that said land is estimated to contain 16 million feet of timber, board measure, 5 thousand feet having been cut in 1893 for building purposes.

This land was included in the Cascade Range Forest reserve by proclamation dated September 28, 1893, which excluded on and after that date, except under the mineral laws, from settlement, entry, sale or other manner of disposal, all vacant unappropriated public lands included and described in said proclamation.

The records of this office show that the plat of the township survey was approved by the Surveyor General of Oregon, January 13, 1894, and was filed in the local office October 23, 1894.

In view of the statements made by the forest supervisor, and the facts disclosed by the records here, pertaining to the land above described, this office on September 25, 1905, addressed a communication to the State Land Agent at Salem, Oregon, calling his attention thereto, and that, as the plat of survey of the township was not filed until more than a year after the date of the proclamation withdrawing and including the land in said forest reserve, following the long settled ruling of the Department, it must be

held that no right to said land accrued to the State by virtue of the grant made by Congress for the benefit of common schools, and requested him to furnish this office with such information as he might be able to supply relative to the assertion and exercise by the State, at any time, of any right and title to this land, and if any such claim had ever been made, by what authority it was done.

In reply thereto, the State Land Agent, Mr. Oswald West, on October 5, 1905, in a letter to this office stated that the E $\frac{1}{2}$ of Sec. 36 was sold by the State to R. Edson, under a contract of sale dated May 17, 1895, and deed given thereto, dated September 1, 1900; that the W $\frac{1}{2}$ of same section was sold and deeded to Valentine Pawley May 4, 1895, and that from letters and papers on file in his office these people, obviously referring to Edson and Pawley, settled on the land prior to its survey, but why they purchased the land from the State instead of filing homestead entries he is unable to state.

He further represents that "the S $\frac{1}{2}$ of Sec. 16, same township and range, was sold under contract to Ira C. Traver and the N $\frac{1}{2}$ of the same section to C. R. Bruntsche, (likely dummies), August 15, 1898, and these certificates, or contracts, were soon afterward assigned to A. S. Baldwin, of the Benson and Hyde crowd, who received a deed to the land June 28, 1899."

He states that he is unable to inform this office why the State Land Board sold these lands, as it appears that the Clerk was cognizant of the fact that

they were unsurveyed at the time they were included in the forest reserve, and that title did not pass to the State.

I have the honor, therefore, to recommend, in view of the foregoing facts, and as it clearly appears the title to these lands has never passed out of the United States, that the Forestry Service of the Department of Agriculture be properly advised thereof, and requested to promptly assume and exercise such authority and supervision over said lands, as will best conserve the government's interests therein and protect the timber thereon and any other valuable property from waste and wanton destruction.

I enclose herewith copy of the correspondence referred to herein, together with the papers comprising the subject matter thereof.

Very respectfully,

W. A. Richards, Commissioner.

M.L.H.

[Defendant's Exhibit 1.]

E

DBM

102660-1903

38377-1904

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Washington, D. C. Oct. 13, 1904

Subject: Omissions in returns of surveys.

The U. S. Surveyor General,
Portland, Oregon.

Sir:

Your letter dated June 8, 1903 together with the returns of surveys of township No. 3 south, range No. 6 east of the Willamette Meridian, Oregon, have been received.

These returns covering the resurvey of the exterior of the exterior boundaries, and the survey of the subdivisional lines of said township as executed by Frank X. Gesner, D. S., under his joint contract with Alonzo Gesner No. 740, dated February 12, 1902 have been under consideration in this office during which it has been observed that the deputy has failed to comply with the requirements of the Manual of surveying instructions, at the beginning of his work of resurvey of the exterior boundaries, by omitting to either describe the kind of instrument used in the execution of the work, or to record any Polaris or Solar observations at this time.

It appears the work was probably commenced April 17, 1902 but no polaris observation is recorded during the resurvey of the exterior lines, between this date and the commencement of the town—subdivision May 7, and only one solar observation May 3, is recorded during this part of the work.

A solar observation is reported at the commencement of the subdivision May 7, being the only one during this work, ending June 16, revealing a failure to comply with that section of the Manual which requires that on every survey executed with solar instruments, the deputy will, at least once on each work-

ing day, record in his field notes the proper reading of the latitude arc; the declination of the sun corrected for refraction, set off on the declination arc; and note the correct local mean time of his observations etc.

You are directed to notify the deputies that before any further action will be taken in this office looking to the acceptance of the surveys, they will be required to file a supplemental report showing a compliance with the Manual in the matters herein cited.

Very respectfully,

Signed

W. A. Richards,

Commissioner.

L. O. F.

DEPARTMENT OF THE INTERIOR
OFFICE OF U. S. SURVEYOR GENERAL

Portland, Oregon, Sept. 8th, 1905.

Hon. Commissioner General Land Office,

Washington, D. C.

Sir:

I have the honor to transmit, this day, under separate cover, for your examination, two books of additional field notes of resurvey of exteriors and subdivisions of Tp. 3 S., R. 6 E., W. M. Oregon, executed by Frank X. Gesner, U. S. Deputy Surveyor, under joint contract No. 740, dated February 12, 1902, including details of the establishment of meridian by Polaris and solar observations and taking the latitude daily. These additional notes were furnished by the deputy in compliance with instructions con-

tained in your letter "E", dated October 13th, 1904.

Very respectfully,

Signed

John D. Daly,

U. S. Surveyor General for Oregon.

"E"

DBM

CLDB

102660-1903

19475-1904

144073-1904

143766-1905

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Washington, D. C. Jan. 31, 1906.

U. S. Surveyor General,
Portland, Oregon.

Sir:

Your letter dated September 8, 1905, transmitting two books of additional field notes of the resurvey of exterior and subdivisional lines of Tp. 3 S., R. 6 E., W. M. Oregon, as executed by Frank X. Gesner, D. S., under joint contract No. 740 Oregon, dated February 12, 1902, has been received.

The two books of additional field notes have also been received and an inspection thereof, together with a comparison with the returns previously filed in this office, completes the record of surveys as called for in office letter "E", dated October 13, 1904.

The completed returns have been compared with the report of Examiner of Surveys, N. B. Sweitzer, who examined the work in the field, and while he

does not recommend the acceptance of the surveys, he states that the work is in fairly good condition.

Considering the surface conditions, and that the errors found were few, and not very great, this office has reached the conclusion to accept the survey. The surveys are therefore hereby accepted, and you are authorized to file the triplicate plats in the local land office.

No entries of any lands will be allowed however, in this township until further permission is given, reference being had to the reports of A. R. Greene, Special Inspector of the Interior Department, dated January 16, 1904, and A. W. Barber, Detailed Clerk, dated July 27, 1904, reporting that the alleged settlement of applicant for the survey were illegal, and the direction of the Hon. Secretary of the Interior, dated August 10, 1904, based on such reports, that no entries be allowed, but that the survey be accepted for payment only.

very respectfully,

Signed

S. A. Richards,

JCP

Commissioner.

DEPARTMENT OF THE INTERIOR
OFFICE OF U. S. SURVEYOR GENERAL,

Portland, Oregon, Feb. 6th., 1906

Register & Receiver,

U. S. Land Office,

Portland, Oregon.

Gentlemen:—

I am this day in receipt of the Hon. Commissioner's

Letter "E" dated Jan. 31, 1906, in which he accepts the survey of Alonzo & Frank X. Gesner of T. 3 S., R. 6 E., W. M., and directs the filing of the triplicate plat in the local land office. The triplicate plat is this day forwarded to you under separate cover. Please acknowledge receipt.

The Commissioner in his letter states: "No entries of any lands will be allowed however, in this township until further permission is given, reference being had to the reports of A. R. Greene, Special Inspector of the Interior Department, dated January 16, 1904, and A. W. Barber, Detailed Clerk, dated July 27, 1904, reporting that the alleged settlement of applicants for the survey were illegal, and the direction of the Hon. Secretary of the Interior, dated August 10, 1904, based on such reports, that no entries be allowed, but that the survey be accepted for payment only."

Respectfully,

Signed

Jno. D. Daly,

U. S. Surveyor General for Oregon.

E

TCH

191517-1907.

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Washington, D. C., Nov. 16, 1907.

Filing Plat

The U. S. Surveyor General

Portland, Oregon.

Sir:

Referring to office letter "E" dated January 31, 1906, advising you of the acceptance of the survey of T. 3 S., R. 6 E., W. M. Oregon, by Alonzo & F. X. Gesner, D. S., under contract No. 740, and directing that the plat be filed in the local land office, but that no entries be allowed in the township until further notice, reference being had to the reports of A. R. Greene Special Inspector, and A. W. Barber, Detailed Clerk, I have to advise you that I am now in receipt of a report from S. N. Stoner, Special Agent, Dated October 30, 1907, in which he reports:

"I made a field investigation, October 28 & 29, 1907, of the bona fides of the applicants for the survey and the present settlers in T. 3 S. R. 6 E., W. M. xxxx."

It was found that the four applicants for the survey, namely, J. W. Elliott, Marion F. Dolph, Chester V. Dolph and E. E. Hazard, did actually enter on the land and build cabins thereon, but that no residence on the land was maintained by either of them.

In the matter of present settlers, it was found that there are now ten actual bona fide settlers, residing on the land, and who took up their residence on their respective claims before the same was withdrawn from entry.

In addition to the work done by the settlers on their respective claims, they have constructed a fairly good wagon road to their settlement, at considerable labor and expense.

The land is heavily timbered and is well adapted to

agriculture and fruit when timber is removed.

In view of the fact that the above settlers are acting in good faith in the matter of residence and improvement, it is respectfully recommended that the survey be accepted to the end that the settlers may file upon their respective claims."

In view of this recommendation you are directed to advise the Register and Receiver that the suspension of this township from entry, as contained in said letter "E" dated January 31, 1906, is hereby revoked and that they will now place said plat on file in accordance with the instructions of circular of October 21, 1885 (4 L. D., 202).

Very respectfully,

Signed

Fred Dennett,
Commissioner.

L. J.

DEPARTMENT OF THE INTERIOR
OFFICE OF U. S. SURVEYOR GENERAL

Portland, Oregon, Nov. 23rd, 1907.

Hons. Register & Receiver,
United States Land Office,
Portland, Oregon.

Sirs:—

With my letter of February 6th, 1906, by direction of the Hon. Commissioner of the General Land Office, I forwarded to you triplicate plat of Tp. 3 S., R. 6 E., the same having been accepted for payment by the Hon. Commissioner's letter "E", dated January 31st., 1906. You were directed in this letter, in accordance

with instructions contained in the Commissioner's letter of acceptance, that no entries of any land will be allowed until further permission is given.

I am now in receipt of the Hon. Commissioner's letter "E", dated November 16th., 1907, in which in accordance with a recommendation made to him by Mr. S. N. Stoner, Special Agent, I am directed to advise you that the suspension of this township from entry as contained in said letter "E" dated January 31st, 1906, is hereby revoked, and that you will place said plat on file in accordance with the instructions of circular of October 21, 1885, (IV L. D. 202).

Please acknowledge receipt of this.

Respectfully,

Signed

GEO. A. Westgate,

U. S. Surveyor General for Oregon.

4-699

DEPARTMENT OF THE INTERIOR
OFFICE OF U. S. SURVEYOR GENERAL

Portland, Oregon

June 4, 1912.

I, Geo. A. Westgate, U. S. Surveyor-General for Oregon, do hereby certify that the annexed copies of official letters are true and literal exemplifications of the originals thereof on file in my office.

Geo. A. WESTGATE,

United States Surveyor-General
for Oregon. (seal)

Filed June 25, 1912.

A. M. Cannon, Clerk U. S. District Court.

[Defendants' Exhibit 2.]

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

Portland, Oregon, June 6th, 1912.

I, H. F. Higby, Register of the United States Land Office, Portland, Oregon, hereby certify that the records of this office show that on the plat of Government survey of Township 3 South, Range 6 East, Willamette Meridian, is a marginal notation in ink as follows: "Received in the United States Land Office at Portland, Oregon, February 7, 1906", same is signed "Algernon S. Dresser, Register."

It is further shown by letter report of the Register and Receiver of this office, to the Commissioner of the General Land Office, under date of May 5, 1909, in reference to the above stated township plat of survey, that, "By (General Land Office letter) "C" " of November 30, 1907,—we were directed that the plat should be officially opened and in accordance therewith advertisement was made and the required instructions in re opening of township plats were complied with, and January 8, 1908, at 9 o'clock A. M., named as the date when actual settlers would be accorded the privilege of presenting their claims."

H. F. HIGBY,
Register.

Filed June 25, 1912.

A. M. Cannon,
Clerk U. S. District Court.

[Defendants' Exhibit 3.]

DEPARTMENT OF THE INTERIOR,
OFFICE OF U. S. SURVEYOR-GENERAL.

Portland, Oregon, June 20, 1912.

Mr. R. Sleight,
1410 Yeon Bldg.,
Portland, Oregon.

Sir:—

I am this day in receipt of your letter of June 20th, 1912, in which you wish to be informed if the following lines of the following townships have been surveyed on or before January 25th., 1907, namely:

The South township line of frac. T. 1 N., R. 7 E. The North township line of T. 1 S., R. 7 E. The section lines between Secs. 6 & 7, 5 & 8, 8 & 9, 16 & 17, 19 & 20, 28 & 29 and 28 & 33, in T. 1 N., R. 8 E., and the township line between Sec. 1, T. 1 N., R. 7 E., and Sec. 6, T. 1 N., R. 8 E., and the North line of Tp. 3 S., R. 8 E., and also of the subdivisions of said township 3 S., R. 8 E., and all of the township and subdivisional lines of T. 3 S., R. 9 E.

In reply, I have to state that the Base Line between Tps. 1 N., and 1 S., R. 7 E., was surveyed in 1858. The S. boundary of T. 3 S., R. 9 E. was surveyed in 1882. The East boundary of T. 3 S., R. 9 E. and the North boundary of Secs. 1, 2, 3, and the west boundary of Secs. 18, 19, 30 and 31 T. 3 S., R. 9 E., were surveyed in 1884.

The East boundary of Secs. 13, 24, 25 and 36, T. 3 S., R. 8 E. were surveyed in 1884.

The balance of the lines mentioned in your letter are unsurveyed.

Respectfully,
GEO. A. WESTGATE,
U. S. Surveyor General for Oregon.

Filed June 25, 1912.

A. M. CANNON,
Clerk U. S. District Court.

[Defendants' Exhibit 4.]

Address reply to
"District Forester"

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
DISTRICT 6

OG
District-Atlas

Beck Building
Portland, Oregon.
June 20, 1912.

Mr. R. Sleight,
c/o Coover & Sleight, Yeon Bldg.
Portland, Oregon.

Dear Sir:

I desire to inform you, in accordance with the request of Mr. A. C. Shaw, that, in the understanding of this office, the broken lines on proclamation diagrams, of which the enclosed diagram dated January 25, 1907, is one, are intended to indicate that the townships were unsurveyed at that date. The township and section lines indicated by solid lines are similarly

intended to indicate that those areas were surveyed at the time.

Very truly yours,

GEO. H. CECIL,

District Forester.

(Enclosure)

Filed June 25, 1912.

A. M. Cannon, clerk

U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON, and the SLIGH FURNITURE
COMPANY, a corporation,

Defendants.

To the Hon. Chas. E. Wolverton, District Judge;
and the judge before whom said cause was tried:

The above named defendants, Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation, conceiving themselves aggrieved by the de-

cree entered herein March 15, 1913, by which it was decreed that plaintiff was entitled to the relief as prayed in its Bill of Complaint and that the plaintiff's title to the lands described in said decree and to every part and parcel thereof is good and valid, and that these defendants and each of them have no right, title or interest therein, and that the contracts of sale, certificates, deeds and other conveyances under which these defendants claim any estate, right, title or interest in said lands be vacated, cancelled and held for naught, and that these defendants and each of them be forever enjoined from asserting any claim to said lands do hereby appeal to the United States Circuit Court for the Ninth Circuit from said decree and from the whole and every part thereof for the reasons set forth in the Assignment of Errors which is herewith filed by these defendants, and these defendants pray that this their petition for said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And that pending the determination of said appeal said decree be suspended upon these defendants and appellants giving a bond in such sum as shall be fixed by the court, and that the amount of said bond to be given upon appeal be fixed by the court.

Dated June 19, 1913.

R. SLEIGHT,

Solicitor for dfts. Finley and

W. J. Morrison and Sligh Furniture Co.

[Endorsed]: Petition for Appeal. Filed June 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913,
there was duly filed in said Court, an Order Al-
lowing Appeal, in words and figures as follows,
to wit:

[Order Allowing Appeal.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON and the SLIGH FURNITURE
COMPANY, a corporation,

Defendants.

On reading and filing the petition of Finley Morri-
son, W. J. Morrison and the Sligh Furniture Com-
pany, a corporation, for an order allowing an appeal
from the decree entered herein March 15, 1913, and
upon the assignment of errors made and filed by said
defendants, and on motion of R. Sleight of counsel
for said defendants:

IT IS ORDERED that the appeal of Finley Mor-
rison, W. J. Morrison and the Sligh Furniture Com-
pany, a corporation, to the United States Circuit
Court of Appeals for the Ninth Circuit from said de-

cree which was entered herein on March 15, 1913, be and the same is hereby allowed and that a transcript of the record be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit. Dated June 19th, 1913.

BY THE COURT
CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Order Allowing Appeal. Filed June 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON, and the SLIGH FURNITURE
CIMPANY, a corporation,

Defendants.

The above named defendants, Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation, assign the following errors upon the decree herein which was entered March 15, 1913:

ASSIGNMENT OF ERRORS.

I.

In decreeing that the plaintiff is entitled to the relief as prayed in its bill of complaint.

II.

In decreeing that the plaintiff's title to the southwest quarter and the northwest quarter and the south half of the northeast quarter and the southeast quarter of section sixteen (16) township three (3) south range six (6) east, W. M. State of Oregon, and to every part and parcel thereof, is good and valid.

III.

In decreeing that defendants, Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation, and each and every of them have no right, title, interest or estate in the said lands or any part thereof, and that the contracts of sale, certificates, deeds and other conveyances under and by virtue of which the said defendants and each of them claim any estate, right, title or interest in said lands be cancelled, vacated and held for naught and that the said named defendants and each of them be forever enjoined and debarred from asserting any claim whatever in or to said lands or any part thereof adversely to the plaintiff.

IV.

In decreeing that the plaintiff recover costs and disbursements in this suit from said defendants.

V.

In failing to decree that the suit could not be main-

tained and should be dismissed.

R. SLEIGHT,
Solicitor for dfts. Finley
Morrison, W. J. Morrison and
Sligh Furniture Co.

[Endorsed]: Assignments of Error. Filed June
19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913,
there was duly filed in said Court, a Bond on
Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON and the SLIGH FURNITURE
COMPANY, a corporation,

Defendants.

KNOW ALL MEN BY THESE PRESENTS that
we, Finley Morrison, W. J. Morrison and the Sligh
Furniture Company a corporation as principals and
Chas. H. Chick of Portland, Oregon as surety are
held and firmly bound unto the United States of
America, plaintiff herein, in the full and just sum of
Five Hundred Dollars to be paid to the plaintiff afore-

said, for which payment well and truly to be made we bind ourselves our successors, heirs, executors, administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of June, 1913.

WHEREAS the United States District Court for the District of Oregon in the cause above entitled pending in said court did make and enter a decree on the 15th day of March, 1913, in favor of the plaintiff and against these defendants, adjudging the plaintiff entitled to the relief prayed in its bill of complaint and that these defendants and each of them be barred of all right, title or interest in and to the lands described in the complaint and be enjoined from asserting any claim thereto, and these defendants having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the aforesaid suit, and a citation directed to the said plaintiff is about to be issued citing and admonishing it to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California, and an order having been made and entered that these defendants should give a bond upon said appeal in the sum of \$500.00 with surety to be approved by the judge or clerk of this court:

NOW THE CONDITION is such that if the said defendants Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation shall prosecute their said appeal to effect and shall answer all

damages and costs that may be awarded against them if they fail to make their plea good then this obligation is to be void; otherwise to remain in full force and virtue.

FINLEY MORRISON,
W. J. MORRISON,
THE SLIGH FURNITURE COMPANY,
By R. SLEIGHT, Atty.
CHAS. H. CHICK.

The sufficiency of the foregoing bond and surety is hereby approved this 19th day of June, 1913.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Bond. Filed June 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913,
There was duly filed in said Court, a Citation on
Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,
Plaintiff,
vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY
MORRISON and the SLIGH FURNITURE
COMPANY, a corporation,
Defendants.

To the United States of America, and the United
States Attorney for the District of Oregon:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, California, thirty days from and after the day this citation bears date pursuant to an order allowing the appeal of the defendants, W. J. Morrison, Finley Morrison and the Sligh Furniture Company a corporation, filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation are appellants and you are appellee, to show cause if any there be why the decree entered in said suit in favor of the above named plaintiff and against the above named defendants Finley Morrison W. J. Morrison and the Sligh Furniture Company a corporation should not be reversed and why such further proceedings should not be had therein as will be agreeable to equity.

WITNESS the Hon. Chas. E. Wolverton, Judge of the District Court of the United States for the District of Oregon this 19th day of June, 1913.

CHAS. E. WOLVERTON,
Judge.

Due service of the foregoing citation admitted this June 19, 1913.

E. A. JOHNSON,
Atty. for Ptff. & Asst. Dist. Atty. for the
District of Oregon.

[Endorsed]: Citation. Filed June 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 26 day of June, 1913,
there was duly filed in said Court, an Order, in
words and figures as follows, to wit:

[Order Certifying Up Exhibits.]

*In the District Court of the United States for the
District of Oregon.*

No. 3866

June 26, 1913

THE UNITED STATES OF AMERICA,
Complainant,
vs.
FINLEY MORRISON, et al,
Defendants.

It appearing to the court that Complainant's exhibits A and B introduced in evidence on the trial of this cause in this court are of such character as to require inspection by the appellate court;

It is ordered that said exhibits be certified up with the record to the United States Circuit Court of Appeals, Ninth Circuit, on the appeal thereof.

CHARLES E. WOLVERTON,
Judge.

[Endorsed]: Order. Filed June 26, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 26 day of June, 1913,
there was duly filed in said Court, an Order, in
words and figures as follows, to wit:

[Order Enlarging Time to File Transcript.]

*In the District Court of the United States for the
District of Oregon.*

No. 3866

June 26, 1913

THE UNITED STATES OF AMERICA,

Complainant,

vs.

FINLEY MORRISON, et al.,

Defendants.

Now, at this day, for good cause shown, it is ordered that the defendants' time for filing the record and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, on the appeal thereof, be, and the same is hereby, enlarged and extended to and including the 1st day of August, 1913.

CHAS. E. WOLVERTON,

Judge.

INDEX

Assignment of Errors	4
Argument	5
Statement of Facts	2



IN THE

**United States Circuit Court
of America**

NINTH DISTRICT

W. J. MORRISON,
FINLEY MORRISON and
SLIGH FURNITURE COMPANY,
a corporation,

Appellants,

v.

THE UNITED STATES OF AMER-
ICA,

Appellee.

APPELLANT'S BRIEF.

STATEMENT.

The lands in question in this suit constitute a part of section 16, in township 3 south, range 6 east, in the state of Oregon. The sole question involved upon this appeal is whether after survey of the lands in the field but

before the survey was approved by the department and the plat of a survey filed in the local land office, the state had such a title to the lands, under the grant of sections 16 and 36 contained in the Enabling Act admitting the state into the Union, as to enable the state to convey such lands to purchasers.

The act admitting Oregon to the Union, approved February 14, 1859, is in part as follows:

“Sections 16 and 36 of every township of public lands in said state, and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said state for school purposes.”

This grant was accepted by the legislature of Oregon by Act of June 3, 1859.

Section 16 involved in this suit was surveyed in the field January 2, 1902. Such field survey was approved by the United States Surveyor General for the State of Oregon on June 2, 1903, and on June 8, 1903, the Surveyor General transmitted copies of the plat and field notes to the General Land Office, and such survey was accepted by the Commissioner of the General Land Office on January 31, 1906, the delay in acceptance being owing to the fact that the deputy surveyor did not use a solar compass, and also to the fact that the settlement of certain settlers on these lands was then under investigation by the Department. On December 16, 1905, the Secretary of the Interior by proclamation temporarily withdrew this land and other lands adjoining, for forestry purposes, and on January 25, 1907, the

President by proclamation established the Cascade Range Forest Reserve, including said section 16 and other lands adjoining.

On October 10, 1906, the State of Oregon executed and delivered certificates of sale of the lands involved in this suit, which certificates were subsequently assigned and under such assignment deeds were executed and delivered by the State on the 9th day of January, 1907, to the appellants, Finley Morrison and W. J. Morrison, covering the lands in controversy, and thereafter the appellants Morrisons conveyed said lands to the appellant Sligh Furniture Company.

This suit was brought by the United States to set aside said conveyances and to declare the United States to be the owner of said lands and to quiet title thereto. The appellants Morrisons and Sligh Furniture Company answered, setting up their title acquired from the State of Oregon and denying the title of the plaintiff. The case was tried upon a stipulation of facts and letters and exhibits thereto attached, showing the foregoing facts.

The plaintiff seeks to recover upon the theory that the withdrawal of section 16 for forestry purposes having been made before the approval of the survey by the General Land Office, although after a survey had been made in the field, no title passed to the appellants under the deed issued by the state, but that the title remained in the United States.

The Court rendered a decree in favor of the plaintiff from which this appeal is brought.

ASSIGNMENT OF ERRORS.

I.

In decreeing that the plaintiff is entitled to the relief as prayed in its bill of complaint.

II.

In decreeing that the plaintiff's title to the southwest quarter and the northwest quarter and the south half of the northeast quarter and the southeast quarter of section 16, township 3 south, range 6 east, W. M., State of Oregon, and to every part and parcel thereof, is good and valid.

III.

In decreeing that defendants, Finley Morrison, W. J. Morrison and the Sligh Furniture Company, a corporation, and each and every of them have no right, title, interest or estate in the said lands or any part thereof, and that the contracts of sale, certificates, deeds and other conveyances under and by virtue of which the said defendants and each of them claim any estate, right, title or interest in said lands be cancelled, vacated and held for naught and that the said named defendants and each of them be forever enjoined and barred from asserting any claim whatever in or to said lands or any part thereof adversely to the plaintiff.

IV.

In decreeing that the plaintiff recover costs and disbursements in this suit from said defendants.

V.

In failing to decree that the suit could not be maintained and should be dismissed.

ARGUMENT.

The grant of Section 16 to the state irrevocably pledged this land to the state, and placed it beyond the power of Congress or the President to divert it to other purposes.

In *Beecher v. Weatherby*, 95 U. S. 517, it was held that under a grant of section 16 to Wisconsin for school purposes, couched in the same terms as the grant to Oregon, the title became vested in the state, and the land could not be appropriated to any other purpose. The court said (page 523) :

“It was therefore an unalterable condition of the admission, obligatory upon the United States, that section 16 in every township of the public lands in the state, which had not been sold or otherwise disposed of, should be granted to the state for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the state upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case the lands which might be embraced within those sections were appropriated to the state. *They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law* authorizing a sale of it could be construed to embrace them, and all that could be legally done under the compact was to identify the

sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. *They could not be diverted from their appropriation to the state.* * * * * * In this case the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section the title of the state, upon the authority cited (*Cooper v. Roberts*, 18 How. 173) became complete, unless there had been a sale or other disposition of the property by the United States *previous to the compact with the state*. No subsequent sale or other disposition, as already stated, could defeat the appropriation."

The decision in the case above cited followed former decisions of the same court in other cases, where similar grants to Michigan and Missouri had been made of section 16 for school purposes.

Cooper v. Roberts, 18 How. 173.

Ham v. Missouri, 18 How. 126.

In *Schneider v. Hutchinson* 35 Ore. 253, the same conclusion was reached, the court, by Mr. Justice Bean, using the following language with reference to the right to divert to other purposes the lands granted for the use of schools, (page 258):

"Again it is contended that the land in question was granted to the state by the general gov-

ernment for the use of schools as upon a condition subsequent, and that upon its application to other purposes the United States has the right to re-enter and take possession, and against this right the statute of limitations does not run, and therefore no person can acquire title to such lands by adverse possession prior to its alienation by the state. The vice of this position lies in the fact that the grant to the state is not upon a condition subsequent, but it is an absolute grant, vesting the title in the state for a special purpose. The language of the act of Congress is that such land 'shall be granted to the state for the use of schools,' and the *United States has no right to re-enter for any reason whatever.*"

From these authorities it is clear that if the land which, upon a survey being made is found to be embraced in Section 16, constituted a part of the public domain at the time of the grant, it was by the grant set apart from the public lands and given irrevocably to the state for the use of schools, so that the government could not afterwards divert it to any other purpose, or do anything whatever with respect to it except to survey it.

II.

Has the rule announced in *Beecher v. Wetherby* and *Cooper v. Roberts* been departed from or overruled in *Minnesota v. Hitchcock* or any other cases?

No doubt the plaintiff will contend that the government has the right to dispose of any of the lands in sec-

tions 16 and 36 at any time before the survey has been approved by the department, and will rely upon *Minnesota v. Hitchcock*, 185 U. S. 373, and *Heydenfeldt v. Daney Gold M. Co.*, 93 U. S. 634, in support of that contention, for the plaintiff cannot prevail in this suit upon any other theory. It therefore becomes important to examine those cases and see whether there is any irreconcilable conflict between them and the authorities above cited. Upon such examination the court will find that instead of being in conflict with the cases cited by us they are in entire harmony with them, and that they still further confirm the opinion that under the circumstances of this case the plaintiff cannot prevail in this suit.

The main feature of the *Hitchcock* case lies in the fact that the lands in question there were Indian lands in which the Indians' right of occupancy had never been extinguished except by treaty, in which it was expressly provided that the lands should be sold for the express benefit of the Indians, the money derived from the sales to be paid to them at stated intervals through a long period of years. The court held that under the treaty which ceded the lands upon these terms the lands were Indian lands *and not a part of the public domain*, and when they were ceded upon these express terms they became thereby impressed with a trust in favor of the Indians, and therefore never became a part of the general public domain upon which the school grant could operate. This is not only in accord with the doctrine laid down in *Beecher v. Weatherby*, but necesasrily followed from the rule there established, that the school grant

could only operate upon lands constituting a part of the public domain. In *Minnesota v. Hitchcock*, at page 393, the court said:

“But considerations may arise which will justify an appropriation of a body of lands within the state to other purposes, and *if these lands have never become public lands* the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which gives it equivalent sections. If, for instance, Congress in its judgment believes that within the limits of an Indian reservation or unceded Indian country—*that is, within a tract which is not strictly public lands*—certain lands should be set aside for a public park, or as a reservation for military purposes, *or for any other public uses*, it has the power notwithstanding the provisions of the school grant section. So it is that when Congress came in 1889 to make provision for this body of lands it could have by treaty taken simply a cession of the Indian rights of occupancy, *and thereupon the lands would have become public lands and within the scope of the school grant.*”

It will be seen that the distinction which we are pointing out between the cases of *Beecher v. Wetherby* and *Cooper v. Roberts* on the one hand and *Minnesota v. Hitchcock* and similar cases on the other, is not a fanciful one created by ourselves, but is one which was carefully kept in mind by the court throughout all these decisions, and is necessary to be observed in order to rec-

oncile decisions which would otherwise appear to be out of harmony with each other. That the court did not consider the doctrine laid down in *Beecher v. Wetherby* at all weakened by the conclusion reached in *Minnesota v. Hitchcock* is clearly evident from the fact that it distinguished the former case upon the ground that in the *Beecher* case the lands embracing the school sections had been entirely freed from the Indians' claims, and had thus become public domain upon which the school grant could operate, while in the *Hitchcock* case the lands had, by treaty with the Indians prior to the admission of Minnesota as a state, been impressed with a trust by which they were to be sold for the benefit of the Indians, the proceeds of the sales to be paid to them for a long period of years, and that on account of their devotion to this purpose the lands *were not a part of the public domain* and hence that the school grant was not operative therein. There is no incompatibility between these decisions, nor was the former overruled by the latter, but on the contrary it was carefully distinguished from it upon the grounds stated. (185 U. S. 394-399). We therefore find the court, in the *Hitchcock* case, carefully guarding against possible misapprehension of its position by using the qualifying phrase "and if these lands have never become public lands." (Page 394). This was in order to confine the conclusion reached to the facts of that particular case, in which the lands had never become public lands because the Indian right of occupancy had never been extinguished except by the treaty, which provided that the lands should be impressed with a trust whereby they should be sold exclusively for the benefit of the In-

dians, a purpose altogether inconsistent with their being devoted to the use of schools by the State. And it should be observed that this Indian right accrued before the grant to the state. In fact, the Indian right had always existed; the treaty simply recognized this previously existing right, and contained provisions by which the United States agreed to secure it by money payments to the Indians, to be derived from the sale of lands which belonged to the Indians, not to the public domain. This land therefore never was a part of the public domain, hence no school land could be "set apart from the public domain" out of it. The court could not well have reached a different conclusion in the *Hitchcock* case without declaring a direct breach of faith on the part of the government under the treaty with the Indians, and the decision emphasizes this point and lays stress upon the fact that a liberal interpretation was placed upon the treaty in that case because it was one made with a simple minded people who would not have understood the language used in any other than its ordinary sense.

Nor is *Heydenfeldt v. Daney Gold M. Co.*, 93 U. S. 634, in conflict with *Beecher v. Wetherby*, 95 U. S. 517, or with the distinction above pointed out, and it is clear that the court did not so consider it, for the former case was cited by counsel in the latter, but was not considered by the court to be of sufficient bearing to be referred to in the opinion, although the *Beecher* decision was rendered only a year later than the *Heydenfeldt* decision.

Consequently we confidently assert that the rule of *Beecher v. Wetherby* remains in full force and applies directly to the circumstances of this case, while the doc-

trine of *Minnesota v. Hitchcock* has no bearing here at all. In the former case it was distinctly held that when the lands, which upon a subsequent survey might be found to be embraced in section 16, constituted a part of the public domain at the time of the grant they were by such grant "withdrawn from any other disposition and set apart from the public domain" and that "no subsequent law" could divest the title of the state; that "they could not be diverted from their appropriation to the state"; and that the title of the state became complete unless there had been a sale or other disposition of the property by the United States "previous to the compact with the state"; and that "no subsequent sale or other disposition, as already stated, could defeat the appropriation." If this language means what it says (and it has never been qualified or overruled) then there is no escape from the proposition that the attempt to reclaim to the government the lands in question here, under the guise of an appropriation for forestry purposes, is altogether illegal and unwarranted.

According to our view the question in dispute is not so much the question of whether the grant under consideration was in *presenti* or in *futuro*, but rather it is what was the intention of Congress when it granted these school lands to the State, and what was the intention of Congress when it authorized the President to create Forest Reservations, and what was the intention of the President when he created the reservation in question here?

From the authorities cited above it is clear that the Supreme Court does not place a strict construction on the formal terms of the grant in order to determine

whether or not it is in *presenti* or in *futuro*. For example in the Heydenfelt case, a grant which was in terms in *presenti* was held to be in *futuro*, while in the Beecher case, a grant which was in terms in *futuro* was held to be, in fact, in *presenti*. In all the cases the court has determined the question of intent from all the surrounding circumstances, as well as from the language of the grant itself, and has clearly settled a definite policy of the construction of these grants, and determined that grants of school lands to the state, worded like the Oregon grant, are considered to be an *irrevocable pledge* of these lands to the state for the purpose named. In no case has the court ever held that Congress could afterwards give this land away to any person. The only cases which seem to declare such a result are those which are decided upon broad grounds of public policy, like the Hitchcock case, where the court held that the lands were not embraced in the grant because they in reality belonged to the Indians, and that the Indians had a prior right to the lands existing before the grant to the state, and that their right had never been extinguished. In the Heydenfelt case, the court reached the conclusion that the lands were not embraced in the grant because it was clear that they were not intended to be so included, and that to hold otherwise would result in destroying the principal industry of the State of Nevada.

No case can be cited where the Government has attempted to take away school lands for its own purposes. The only instances where the school grant is held to be superseded by a superior right are where settlers have settled on the lands before survey, or where the lands

have never become public domain, as in the **Hitchcock** case. The Act of February 21, 1891, was passed primarily for the purpose of preserving the right of settlers who had settled before any surveys were made and who could not tell until after the survey on what definite subdivisions or sections their settlement was made. Presumably in the interests of settlements and development of the public domain the act of February, 1891, was passed, and the court has placed a liberal construction upon it, especially in view of the fact that the state has a right under the Act to select other lands in lieu of the lands settled on.

But it should be remembered that the attempt in this case to take these lands away from the state is made after the state had in fact deeded them as state lands, and after they had gone into the hands of an innocent purchaser for value, and after the lands had been surveyed in the field, and that this attempt is made by subordinate officials in the Forestry Department of the Government. But the Supreme Court of the United States takes a broader view of such questions, and under the circumstances here it would seem that the court would adhere to the doctrine laid down in the **Beecher** case, that when these lands were granted to the State of Oregon they were irrevocably set apart from the public domain for school purposes, and that it was beyond the power of Congress to authorize their being utilized afterwards for forest reservation purposes, and that under the wording of this proclamation the president never intended to set aside any school lands as constituting a part of this reservation.

As stated above, the Government will in no way be prejudiced by failure to recover these lands, because the case of *Hibbard vs. Slack* below cited conclusively shows that although lands may be embraced within the outer limits of reservations they do not necessarily constitute a part of it, and the court will observe that the township in question, in which the lands involved in this case are situated, is the outside township of this reservation, and section 16 is almost on the outside of the limits of the reservation.

There are many other sections like this similarly situated, not only in this state, but in other states, and if the court should hold that these lands did not belong to the state, not only the appellants in this case, but many other innocent purchasers must suffer by this construction.

III.

As we have seen above, the appellants claim that the state's title became perfect at the time of the grant, the government having nothing further to do than to identify the land by a subsequent survey. When such survey is made the title relates back to the time of the grant.

Does the title pass to the state only upon a survey being made; and if so does this mean a survey in the field or only when the survey is finally approved?

As to when the survey is considered sufficiently complete to operate as a segregation of the land from the public domain so as to cut off the rights of all persons

except the state, is made plain by legislative enactment and judicial construction.

Section 2275 Revised Statutes as amended by the Act of February 25, 1891, providing for the selection by the state of other lands in lieu of those situated in school sections which have been settled upon, provides that if the settlement was made "before the survey of the lands in the field" the lands shall be subject to the claims of settlers. It further provides that other lands of equal acreage are also appropriated where the school lands "are mineral land, or are included within any Indian, military, or other reservation." Is there any plausible reason why, under this statute, it should be claimed that the time of the survey in the field should be held to be the criterion applying to settlers while a different time is applied to withdrawals for Indian or forestry reservations or other purposes? We think no such construction can be placed upon the statute. If then the criterion fixed by this statute is to be in force the plaintiff's case here must fail, for the survey of this section in the field was complete several years before any attempt to withdraw the lands in suit.

In *Hibbard v. Slack*, 84 Fed. 571, in an exhaustive and elaborate discussion of the effect of the Act of 1891 (R. S. Sec. 2275) the court held that a state could not select indemnity lands in lieu of school lands which, after they had been surveyed in the field and the title thereby become fixed in the state, were included within the exterior boundaries of a forest reservation; also that the title to school lands became so vested in the state by a survey in the field that they were not thereafter sub-

ject to the disposal of Congress, and although included within the exterior limits of a forest reservation did not form a part of the reservation. In deciding this case the court applied the criterion of time fixed by the statute with respect to settlers, viz. "before the survey in the field" to the provisions relating to the disposal of the land for reservations or other purpose, and this is doubtless the correct construction. The court said (p. 574):

"In construing the Act of February 28, 1891, there are certain well established principles of law applicable to school sections, which should constantly be borne in mind, as follows: First, Title to school section, if unencumbered at date of survey, then vests absolutely in the state." (Citing cases). "And this is the principle recognized and acted upon by the Department of the Interior." (Citing cases.) "After title has thus vested the section is not subject to any further legislation by congress. Therefore the school sections which were the bases of the selections of the lands sued for in the case at bar, although situated within the limits of forest reservations, are not parts of such reservations." (Citing cases.) "Second, *Until the surveys in the field* of the school sections, to-wit 16 and 36, the United States has full power of disposal over them."

The decisions of the Department, referred to in the foregoing petition, were followed by the Supreme Court of California, which held that the title to school lands became vested in the state when the survey was made in the field.

Oakley v. Stuart, 52 Calif. 521, 535.

But even if the court should deem that the survey contemplated by law, as requisite to pass the title, was incomplete until approved by the Surveyor General, as was held in the later case of *Medley v. Robertson*, 55 Cal. 396, it would not change the result in this case, for the survey of this section 16 was so approved June 2, 1903, while no attempt at a withdrawal was made until December 16, 1905, when the Secretary's order was made, and the actual proclamation of withdrawal was not issued until January 25, 1907.

IV.

Another objection to plaintiff's contention consists in the fact that the survey was finally accepted by the department January 31, 1906, and plat filed in the District Land Office February 7, 1906, nearly a year before the actual proclamation of withdrawal; and the same was accepted as originally made, without any change whatever. So that, under the doctrine of relation, which has long been recognized by the courts as applying in questions of title, when so accepted it related back to its inception, and the title of the state vested under it as of the date of its completion in the field.

And again, when the withdrawal was made it was a withdrawal according to the said survey; that is, a plat was attached to the proclamation showing this section to be surveyed and withdrawing the lands according to the descriptions on the plat. While we do not claim the government would be estopped by the acts of its officers, we nevertheless think this is of significance as showing

the construction of the department that this section was then surveyed land, following the uniform ruling that it was surveyed when the survey had been made in the field and approved by the Surveyor General.

V.

But regardless of the question of when the survey shall be deemed to be made so as to vest title in the state, it would seem that there was no actual withdrawal of this section 16 by the proclamation of January 25, 1907, for by the terms of the proclamation these lands were in effect excepted from its operation. The language of the exception is as follows:

“and also excepting all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent.”

This exception clearly recognizes the rule announced in *Hibberd v. Slack*, *supra*, that although lands may be embraced within the exterior limits of a reservation they are not necessarily thereby a part of it; and that the uses or purposes to which some of the lands so embraced may have been devoted or pledged may be inconsistent with their use for forestry purpose. This exception would seem to apply with as much or more force to school lands than to any other when it is considered that the Supreme Court has so often and emphatically held that the grant to the state pledged the lands for that purpose, and set them apart from the public domain that they might be devoted to that use, and especially when it is

remembered that the court has pursued a liberal policy with reference to these lands to maintain the good faith of the government towards the state. So that we believe it was the expressed intention of the government to except school sections from the operation of the withdrawal.

VI.

But there is a final insuperable objection to the maintenance of this suit by the plaintiff, irrespective of all other questions, namely: that the Act of 1891 (Sec. 2275 as amended) expressly gives the state the right of election to select other lands in lieu of those in the school sections which have been embraced within a reservation, or to await the extinguishment of the reservation and the restoration of the lands therein embraced to the public domain and then to take the specific lands in such sections 16 and 36.

Rev. Stats., Sec. 2275 as amended.

United States v. Thomas, 151 U. S. 577, 583.

The state of Oregon never waived its right to the lands in question here by selecting or attempting to select other lands in lieu of them, but on the contrary it conveyed these lands to the appellants' grantors after they were surveyed, showing its intention to claim these specific lands. Consequently even if it be held that these lands were legally set apart and form a part of this reservation, the appellants would nevertheless be entitled to await the extinguishment of the reservation and claim the specific lands in question. It follows therefore that

the plaintiff cannot prevail in a suit seeking to foreclose the appellants of their claim to the lands.

In every case involving the question of the right of a state to school lands under grants similar to this the Supreme Court has pursued a liberal policy of awarding the lands to the state wherever it was possible to do so; and in every instance where it was not done, it was due to some superior equity previously existing in a third person, not in the government, as in the Indians in the Hitchcock case and in the miners in the Heydenfeldt case. Where no such equity existed the right of the state has been considered as accruing at the time of the grant, as in the Cooper and Beecher cases. No such prior equity exists here, and no monetary loss will fall upon anyone by denying the plaintiff's claim, but on the other hand great loss would be entailed upon the appellants here, who purchased from the state in good faith, as well as upon all other persons falling within the same class who have made similar purchases from the state.

It is therefore respectfully submitted that the decree should be reversed and the complaint dismissed.

R. SLEIGHT,
Attorney for Appellant Morrison.

No.

UNITED STATES OF AMERICA.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

W. J. MORRISON, FINLEY MORRISON AND SLIGH
FURNITURE COMPANY, a corporation,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States
for the District of Oregon.

BRIEF FOR APPELLANT,
SLIGH FURNITURE COMPANY.

MARK NORRIS,
Of Counsel for Sligh Furniture Co.

UNITED STATES OF AMERICA.

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Appellee.

**Names and Addresses of Attorneys
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INDEX.

	PAGE
Statement of case, I,	1, 2
Claims of parties, II,	2
Errors assigned, II,	2
Outline of Facts, IV,	3-11
(a) U. S. policy as to School Land Grant, IV	
A,	3-7
(b) Facts in this record stated chronologi-	
cally, IV, B,	7-12
Complainant's Contention, V,	12
Defendant's Contention, VI,	12-14
Argument, VII,	14-28
A. By acceptance of enabling act, Oregon ac-	
quired vested right subject to identification	
by survey,	14-18
B. Lands were identified by field survey,	18-21
C. Lands were identified by approval of sur-	
vey by Surveyor General of Oregon,	21-24
D. General Land Office approved survey in 1905	
by official use,	24, 19, 20, 21
E. Statute of 1848 and Grant of 1859 super-	
seded executive withdrawal of 1905, if such	
withdrawal had force,	24
F. Executive withdrawal of 1905 of no force, ...	25-26
G. President's proclamation in 1907 of no	
force,	26-28

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for the District of Oregon.

BRIEF FOR APPELLANT,
SLIGH FURNITURE COMPANY.

I.

Appellee, complainant below, filed its bill to quiet its asserted title (R. 7, XII) to lands in Section 16, Township 3 South, Range 6 East, Willamette Meridian, Ore-

gon (R. 2, I). Defendant company, appellant here, claims title to the Northwest quarter of the Northwest quarter, the South half of the Northeast quarter, and the Southeast quarter of said section (R. 12, X). It disclaims all interest in all other lands described in the bill (R. 11, VI; R. 12, IX). Defendants and appellants Morrisons are grantors of the appellant company (R. 17, XIX), and except as warrantors to the appellant company appear to have no interest in any of the lands described in the bill (R. 35, 36, VI, VII; R. 11, VI; R. 12, IX).

II.

Complainant and appellee claims title as original proprietor, asserting that said lands have never been granted by it and that the same are now parcel of the Oregon National Forest (R. 2, I). Defendants and appellants claim title to said lands under the school land grant to the state of Oregon and by mesne conveyances from that state (R. 13-17, XIII-XIX). The court below decreed the lands in question to be the property of complainant and appellee and that its title should be quieted (R. 28-30). The court's reasons for so ruling are found in its opinion (R. 19-28). The defendants appeal (R. 52, 53), and assign for error that the court below erred.

First, in decreeing that the plaintiff is entitled to relief;

Second, in decreeing that the plaintiff's title to the lands in which appellants are interested is good and valid;

Third, in decreeing that the defendants and appellants have no title to the lands claimed by them, and that their muniments of title be vacated and they enjoined from asserting any title in the future;

Fourth, in awarding costs to the plaintiff;

Fifth, in not dismissing the bill (R. 56, 57).

III.

The sole question in the case is, has the title to the lands involved, and in which the defendants and appellants are interested, passed from the United States to the state of Oregon?

IV.

The facts are all matters of record and are undisputed. Most of them are stipulated (R. 31-36). Other facts, like Statutes of the United States, its school grant policy, the Statutes of Oregon, etc., are matters of judicial knowledge.

Brown v. Piper, 91 U. S. 37.

Furman v. Nichols, 8 Wall. 44.

Gardner v. Barney, 6 Wall. 499.

Spokane v. Zeigler, 167 U. S. 65.

Hoyt v. Russell, 117 U. S. 401.

Owings v. Hull, 9 Pet. 607.

Lamar v. Micon, 114 U. S. 218.

Caha v. United States, 152 U. S. 211.

Blake v. United States, 103 U. S. 227.

A.

From the ordinance of 1787, which contained these memorable words: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged" (1 Bioren & Duane's Laws of the United States, 475), it has been the policy of the United States to grant to each state as it was organized section 16 in each township for the use of the schools. From 1848 the grant has been of sections 16 and 36.

The Public Domain, Donaldson, Government Printing Office, 1884, pp. 223-228.

These grants were made by congressional reserva-

tions to the territories followed by congressional grants to the states as they were organized.

“Statement of the grants to State and reservations to Territories for school purposes.

State and Territories.	Dates of grants.
------------------------	------------------

Section 16.

Ohio,	March 3, 1803.
Indiana,	April 19, 1816.
Illinois,	April 18, 1818.
Missouri,	March 6, 1820.
Alabama,	March 2, 1819.
Mississippi,	March 3, 1803; May 19, 1852; March 3, 1857.
Louisiana,	April 21, 1806; February 15, 1843.
Michigan,	June 23, 1836.
Arkansas,	Do.
Florida,	March 3, 1845.
Iowa,	Do.
Wisconsin,	August 6, 1846.

Sections 16 and 36.

California,	Act March 3, 1853.
Minnesota,	February 26, 1857.
Oregon,	February 14, 1859.
Kansas,	January 29, 1861.
Nevada,	March 21, 1864.
Nebraska,	April 19, 1864.
Colorado,	March 3, 1875.
Washington Territory,	March 2, 1853.
New Mexico Territory,	September 9, 1850; July 22, 1854.
Utah Territory,	September 9, 1850.
Dakota Territory,	March 2, 1861.

Montana Territory,	February 28, 1861.
Arizona Territory,	May 26, 1864.
Idaho Territory,	March 3, 1863.
Wyoming Territory,	July 25, 1868.

Oregon was the first territory for which sections 16 and 36 were reserved (Act of Aug. 14, 1848, 9 Stats. 323), and the third to which those two sections were granted.

California, Act of March 3, 1853, 10 Stats. 244.

Minnesota, Act February 26, 1857, 11 Stats. 166.

Oregon, Act February 14, 1859, 11 Stats. 383.

The first statute dealing with the school lands in Oregon was the act of August 14, 1848, 9 Stats. 323. Section 20 of that act is as follows:

“That when the lands in said territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same hereby is, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same.”

From the adoption of that statute to the present time, so far as the writer can discover, no statute relating to the public domain has failed to recognize the obligation of the United States and the right of the territory or state under that grant.

The act of September 27, 1850, 9 Stats. 496, Oregon Donation Act, Section 9, provides:

“That no claim to a donation right under the provisions of this act upon sections sixteen or thirty-six shall be valid or allowed if the resi-

dence and cultivation upon which the same is founded shall have commenced after the survey of the same.”

The act of February 19, 1851, 9 Stats. 568, Section 1, provides:

“That the governors and legislative assemblies of the territories of Oregon and Minnesota be and they are hereby authorized to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste sections numbered sixteen and thirty-six in said territories, reserved in each township for the support of schools therein.”

The act of January 7, 1853, 10 Stats. 150, gave Oregon a lieu right in place of lands on these sections acquired under the donation act.

The enabling act of February 14, 1859, 11 Stat. 383, provides;

“That the following propositions be and the same are hereby offered to the said people of Oregon for their free acceptance or rejection; which, *if accepted, shall be obligatory upon the United States and upon the state of Oregon*, to-wit: *First*, That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto and as contiguous as may be, *shall be granted* to said state for the use of schools. * * * Provided, however, that in case any of the lands *herein granted* to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount

so confirmed shall be deducted from the quantity specified in this act.”

The undoubted intention of the Congress that Oregon should have these sections for school purposes, evidenced by these statutes, ought not to be defeated by narrow technicalities.

B.

The facts material to this controversy stated in the order of their dates are as follows:

August 14, 1848, sections sixteen and thirty-six reserved by act of congress “when * * * surveyed under the direction of the government of the United States preparatory to bringing the same into market,” 9 Stats. 323.

February 14, 1859, sections sixteen and thirty-six granted the state of Oregon on the state agreeing to certain stipulations.

11 Stats. 383, ante p.

June 3, 1859, acceptance by Oregon of the stipulations mentioned in the act of February 14, 1859.

1 Lord’s Oregon Laws, pp. 28, 29.

This act, so far as material to this controversy, is as follows:

“Whereas, the congress of the United States did pass an act, entitled ‘An act for the admission of Oregon into the Union,’ approved the fourteenth day of February, one thousand eight hundred and fifty-nine; which said act contains the following propositions for the free acceptance or rejection of the people of the state of Oregon, in the words following: ‘§ 4. The following propositions be and the same are hereby offered to the said people of Oregon, for

their free acceptance or rejection, which, *if accepted, shall be obligatory on the United States and upon the said state of Oregon, to-wit: First,* That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold, or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools.

* * * *

Sixth, And that the said state shall never tax the lands or the property of the United States in said state, *provided, however,* that in case any of the lands *herein granted* to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purpose specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act;’ therefore—

§1. Propositions of Congress Accepted.

That the six propositions offered to the people of Oregon in the above recited portion of the act of congress aforesaid be, and each and all of them are hereby, accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to-wit:

Be it ordained by the legislative assembly of the state of Oregon, That the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find neces-

sary for securing the title in said soil to the *bona fide* purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents; and that the said state shall never tax the lands or property of the United States within said state."

By force of the foregoing legislation we claim the Oregon school land grant vested in the state of Oregon as a float, on June 3, 1859, and that thereafter, the moment the lands were identified by survey, the grant vested as to the specific sections.

April 17, 1879. This date is of importance for the reason that prior to that date the surveys of the United States lands were complete, and the lands surveyed became "public lands" upon the approval of the surveyor general of the state in which the lands lay. Subsequent to this date, by a rule of the land office, the surveyors general were required to transmit the surveys to the land office at Washington and the surveys were not regarded as complete until approved by the general land office there.

Tubbs v. Wilhoit, 138 U. S. 134.

June 2, 1902, Field survey of the lands in question made (R. 32, III).

June 2, 1903, field survey of lands in question approved by the Surveyor General of Oregon (R. 33, III).

June 8, 1903, plat of field survey and survey notes sent to general land office at Washington (R. 33, III).

October 13, 1904, general land office requires from deputy surveyors a supplemental report showing the kind of instrument used in making the survey, and whether polaris and solar observations had been taken during the survey in the field as was required by the manual of surveying instructions (R. 41, 42).

September 8, 1905, supplemental report showing the omitted observations, etc., sent to general land office (R. 42, 43).

November 28, 1905, withdrawal of the lands in question "for a proposed addition to the Cascade and Bull-run Forest Reserve requested by the Secretary of Agriculture" (Complainant's Exhibit A, not printed but returned for inspection; see Record 61).

December 16, 1905, Secretary of the Interior, by letter, temporarily withdraws the "vacant and unappropriated public lands" in the township involved from "all forms of disposition whatever, except under the mineral laws." (Compl. Ex. A.)

December 19, 1905, local land office advised of this withdrawal by telegram and letter. (Compl. Ex. A.)

January 31, 1906, the survey of this township formally accepted and approved by the general land office and its filing in the local land office authorized (R. 43, 44). This approval was of the survey as originally turned in by the surveyor general, and without any modification whatsoever. (R. 44.)

February 6, 1906, the Surveyor General for Oregon authorized the register and receiver of the local land office to file the plat of this survey (R. 44, 45).

February 7, 1906, the plat was received in the local land office at Portland. In his letter of approval, the commissioner of the general land office directed that no *entries* of any lands be allowed until further permission is given, for the reason that there were sundry alleged illegal settlements within the limits of the same.

October 10, 1906, the state of Oregon issued its certificate of sale of the lands claimed by the defendants and appellants.

January 7, 1907, the state of Oregon deeded the lands to the grantor of defendants and appellants.

January 25, 1907, presidential proclamation enlarging the Cascade Range Forest Reserve by including within it the township in question. This proclamation contains the following exception:

“Excepting from the force and effect of this proclamation all lands which are at this date embraced in any legal entry or covered by any lawful filing or selection duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law and the statutory period within which to make entry or filing of record has not expired; and also excepting all lands which at this date are embraced within *any withdrawal or reservation for ANY use or purpose to which this reservation for forest uses is inconsistent;*
* * * ”

January 26, 1907, Oregon's deed of these lands recorded.

November 16, 1907, the alleged irregular entries in this township having been investigated, the suspension of entries directed by the commissioner's letter of January 31, 1906, was removed by the commissioner of the general land office (R. 46, 47).

November 23, 1907, the Surveyor General of Oregon communicated this letter to the local land office (R. 47, 48).

January 8, 1908, actual settlers authorized to present their claims (R. 49).

July 12, 1910, defendants Morrisons deed to the defendant, the Sligh Furniture Company (R. 17, 36).

June 30, 1911, certain areas, not including the township in question, eliminated from the Oregon National Forest by presidential proclamation (Government's Exhibit B, not printed).

V.

Complainant contends: That the United States having by statute granted to Oregon these school lands may now by executive proclamation, in effect, repeal that congressional grant, not because third parties acquired rights in the lands before they were surveyed but because the forestry department wants the land, i. e., the government is to keep the land for its own benefit. This claim is based on certain propositions.

1. That Oregon had no right to these specific lands prior to the formal approval of the survey by the General Land Office.

2. That before such formal approval the Secretary of the Interior temporarily withdrew "from all forms of disposition whatever except under the mineral laws" the "*vacant unappropriated public land*" in the township in question.

3. That such withdrawal continued in force after the approval of the survey by the General Land Office.

4. That after the survey had been approved, the President by proclamation included these lands in Oregon National Forest.

5. That the temporary withdrawal and presidential proclamation worked to deprive Oregon of these specific lands and forces her to select indemnity lands in lieu thereof.

VI.

Defendants contend:

1. That by Oregon's acceptance of the provisions of the enabling act of February 14, 1859 (11 Stats. 383) on June 3, 1859 (1 Lord's Oregon Laws, 28, 29), Oregon acquired a present vested right to all school sections as a float, subject only to identification by survey, upon which the grant vested in the specific lands in question.

2. That the lands in question were identified so as to vest title to the specific lands in the state when the field survey was made on June 2, 1902; or

3. If not then, upon the approval of the field survey by the Surveyor General of Oregon June 2, 1903.

4. That if the approval of survey by the General Land Office was required, such approval was made, prior to any withdrawal, by the official use by the General Land Office and other departments of this identical survey for the purpose of identifying these identical lands.

5. That immediately upon the formal approval of the field survey by the land office, January 31, 1906, the statutory reservation and grant (contained in 9th Stats. 323, 11th Stats. 383) destroyed the effect of the temporary withdrawal—if such withdrawal ever had any effect—and vested the title to these specific lands in Oregon.

6. That the alleged executive withdrawal of these lands, made December 16, 1905, was of no force because—

(a) If the lands were then public lands; i. e., surveyed, the school grant had vested in the specific lands and the executive department had no authority in the premises.

(b) If the lands were then not public lands; i. e., unsurveyed, there was no executive power to withdraw or reserve them for forest purposes.

(c) That even if the Secretary's withdrawal of December 16, 1905, had force, upon the approval of the survey by the General Land Office January 31, 1906, the congressional reservation and grant took precedence of any executive action.

7. That the presidential proclamation of January 25, 1907, did not affect these lands because (a) at that time the grant was vested in the state of Oregon as to these specific lands, and (b) the proclamation expressly excepts the lands in question from its operation.

VII.

ARGUMENT.

A.

That by acceptance of the provisions of the enabling act Oregon acquired a vested right to all school sections as a float, subject as to the specific lands to identification by survey.

The learned circuit judge devotes a considerable portion of his opinion to a discussion of this question. He quotes a portion of the enabling act, and, in our judgment, not the most significant portion. He also says (R. 24) that the Minnesota enabling act is "identical with that of Oregon as to the grant of school lands." We urge that the learned circuit judge has overlooked the most significant portion of the enabling act (11th Stats. 383, Sec. 4), as follows:

"That the following propositions be and the same are hereby offered to the said people of Oregon for their free acceptance or rejection, which, *if accepted, shall be obligatory upon the United States and upon the state of Oregon, to-wit: First*, that sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, *shall be granted* to said state for the use of schools."

Then follow four other offers to the people of the state of Oregon, all of which are in the same language, "shall be," etc.

Then comes a very significant clause—

"*Sixth*, And that the said state shall never tax the lands or the property of the United States in said state; *provided, however*, that in case any of the *lands herein granted* to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

Upon its face the evident intent of this grant is that it shall take effect upon acceptance by Oregon. That being done, the lands are spoken of in the act itself as "*the lands herein granted*" which are words of present grant. These words are found neither in the Minnesota nor Wisconsin school grants, and to that extent the Oregon school grant affords stronger ground for holding it a present grant than either the Minnesota or Wisconsin grants.

The words "*if accepted shall be obligatory upon the United States and upon the said state of Oregon*," which the learned judge seems not to have considered at all, further enforce the intent claimed.

After acceptance by Oregon no reservation of these lands to the United States for its own use or benefit could be of any force.

Beecher v. Weatherby, 95 U. S. 517.

In *Beecher v. Weatherby* the court said:

"It matters not whether the words of the compact be considered as merely promissory on the part of the United States and constituting only a pledge of a grant in future, or as operat-

ing to transfer the title to the state upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the state. They were withdrawn from any other disposition and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the state."

After commenting upon the case of *Cooper v. Roberts*, 18 How. 173, the court, referring to the fact that in the case under discussion the lands had been surveyed, said:

"With this identification of the sections, the title of the state upon the authority cited became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the state. No subsequent sale or other disposition, as already stated, could defeat the appropriation."

The case of *Beecher v. Weatherby* was cited with approval in the case of *United States v. Thomas*, 151 U. S. 577, 583. In *United States v. Thomas* the court said,

referring to the Wisconsin act, considered in *Beecher v. Weatherby*:

“This compact whether considered as merely promissory on the part of the United States and constituting only a pledge of a grant in the future, or as operating as a transfer of the title to the state upon her acceptance of the proposition, as soon as the sections could be afterwards identified by the public survey—in either case the lands which might be embraced within those sections were appropriated to the state, subject to any existing claim or right.”

See also,

Cooper v. Roberts, 18 How. 173.

Ham v. Missouri, 18 How. 126.

It is claimed by counsel for the United States that the doctrine of *Beecher v. Weatherby* has been in effect overruled by the cases of *Heydenfeldt v. Daney*, 93 U. S. 634, *Minnesota v. Hitchcock*, 185 U. S. 393, 400, and *Wisconsin v. Hitchcock*, 201 U. S. 202. The court will note that *Heydenfeldt v. Daney* was decided before the case of *Beecher v. Weatherby*. If therefore there is any necessary conflict between the two cases, *Beecher v. Weatherby* being subsequent in date must be regarded as having overruled the decision in *Heydenfeldt v. Daney*. There is, however, no inconsistency between these two decisions, as the court will readily note from an examination of the same. The school land grant in Nevada has held in *Heydenfeldt v. Daney* not to be a grant *in praesenti*, and it based its decision upon words of qualification in the grant which it considered in the light of conditions existing in and peculiar to the state of Nevada, which conditions, so far as this record shows, do not exist in the state of Oregon.

The case of *Minnesota v. Hitchcock* expressly recognizes, and by quotations reaffirms with approval, the doctrine of *Beecher v. Wetherby*. All that the case holds is, that the title of the state of Minnesota had never attached to the lands involved, for the reason that such lands had never become public land but had been occupied by Indians and had therefore not passed under the grant contained in the enabling act.

The case of *Wisconsin v. Hitchcock*, 201 U. S. 202, was decided upon the authority of *United States v. Thomas*, 151 U. S. 577, in which the *Beecher* case was expressly recognized and reaffirmed. There is nothing in the latter case at all in conflict with the case of *Beecher v. Weatherby*.

Attention is again called to the fact that the act under consideration contains language not found either in the school grants to Wisconsin, Minnesota or Nevada. The language which we have quoted above shows that the act itself speaks of the lands not only as "shall be granted" on acceptance, but presuming such acceptance, speaks of the lands as "herein granted."

As to the grant vesting in the state of Oregon as a float immediately on acceptance, see

St. Paul v. Northern Pacific, 139 U. S. 5.

United States v. Oregon & Calif. R. R., 176 U. S. 28.

Butz v. Northern Pacific, 119 U. S. 55.

Southern Pacific v. United States, 168 U. S. 1.

United States v. Southern Pacific, 146 U. S. 570.

Menotti v. Dillon, 167 U. S. 703.

Missouri, Kansas & Texas v. Cook, 163 U. S. 191.

B.

The lands in question were identified by the field survey so as to vest title in specie in the state.

Facts as to field survey.

June 2, 1902, field survey made.

June 2, 1903, field survey approved *unaltered* by Surveyor General of Oregon.

June 8, 1903, field survey transmitted to General Land Office.

November 28, 1905, field survey *used* by Agricultural Department to identify these specific lands (Complainant's Exhibit A, not printed).

December 12, 1905, field survey *used by the commissioner of the General Land Office to identify these specific lands.*

December 16, 1905, field survey used by Secretary of the Interior to identify these specific lands.

December 19, 1905, field survey used by General Land Office to identify these specific lands.

January 31, 1906, field survey approved by the General Land Office *unaltered*.

The question is one of identification. If the field survey is a good enough identification to identify for purposes of description and withdrawal by the government, it should be of force for the same purpose by the state. Official use of a plat is an approval of the same.

Wright v. Roseberry, 121 U. S. 488, 517.

Tubbs v. Wilhoit, 138 U. S. 134, 144, 145.

In *Wright v. Roseberry* certain plats, furnished by the state of California, were by statute required to be approved by the General Land Office (p. 514). No formal approval of the plats appeared, but it did appear that they had been officially used. This was held to be a sufficient approval, and the court speaks of the plat (p. 517) as "approved by the commissioner as shown by its official use," and they hold that the plat was sufficient and based title upon it.

In the subsequent case of *Tubbs v. Wilhoit*, the court, alluding to the decision in *Wright v. Roseberry*, said (p. 144) :

“In *Wright v. Roseberry* there was no approval of the township plat in terms, but it was held to be an approved plat by the fact that it was officially used as such.”

In the *Tubbs* case there was a similar plat, to which the commissioner of the general land office was shown to have made reference, and subsequently thereafter the United States issued a patent describing the lands according to the official plat of the survey. Having considered these facts, the court further said (p. 145) :

“It is, therefore, conclusively established that such township plat was recognized by the Land Department at Washington as a correct plat, and used as such, which was the only approval of a similar plat in *Wright v. Roseberry*.”

And on page 146 the court said :

“Whether the township plat be considered as approved by the action of the surveyor general or by the subsequent recognition of its correctness by the commissioner of the General Land Office, when approved, the duty of the commissioner to certify over to the state the lands represented thereon as swamp and overflowed was purely ministerial. * * * A strange thing it would be if the refusal of an officer of the government to discharge a ministerial duty could defeat a title granted by an act of Congress, and enable him to transfer it to parties not within the contemplation of the government.”

In addition to this official use of this plat, forty-three days later, January 31, 1906, the plat was formally approved by the general land office without alteration or amendment of any kind. By the familiar doctrine of relation, the facts should be held to identify this land as being within the school land grant as of the date of the field survey. The contention of the government that formal approval is necessary under the circumstances shown in this case, amounts to nothing but a pure technicality, which should not be allowed to defeat the evident intent of the congressional grant.

That the field survey is sufficient identification seems to have been the construction placed upon these grants by Congress itself. A survey is merely an act of the political department serving to identify what was before floating and unidentified.

Cooper v. Roberts, 18 How. 173.

By the act of Congress of February 28, 1891, amending Section 2275 of the Revised Statutes (26 Stats. 796), it is provided that in case of a conflict between settlers and the state over school sections, if the settlement was made *before the survey of the lands in the field* the claim of the settler shall have priority, and that on the other hand, if the settlement was made after the survey in the field, the implication necessarily is that the claim of the state has priority. It is not perceived why the rule laid down by Congress for the settlement of disputes between the state and settlers is not equally applicable for the settlement of disputes between the state and itself.

C.

If the field survey was insufficient as an identification, the approval of that survey on June 2, 1903, by the Surveyor General of Oregon was a sufficient identification

and fully complied with the acts of Congress governing this grant.

By the act of August 14, 1848 (9 Stats. 323) these lands, when surveyed, "under the direction of the government of the United States preparatory to bringing the same into market," were reserved for the use of the schools. As we have seen by the act of February 14, 1859 (11 Stats. 333), these lands, subject to identification by survey, were granted to the state of Oregon.

A statute speaks, and its meaning is to be determined as of the date of its adoption. What it meant when adopted it continues to mean until it is amended or repealed. It cannot mean one thing at one time and something else at another.

In Endlich on Interpretation of Statutes (Ed. 1888, Sec. 85) it is said:

"The language of a statute, as of every other writing, is to be construed in the sense it bore at the period when it was passed."

See also

Platt v. Union Pac., 99 U. S. 48, 63.

Smith v. Townsend, 148 U. S. 490, 494.

M. & O. v. Tennessee, 153 U. S. 486, 502.

Dewey v. United States, 178 U. S. 510, 520.

In *Platt v. Union Pacific* the Supreme Court said, speaking of the construction of statutes:

"There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. * * * But in endeavoring to ascertain what the Congress of 1862 intended we must as far as possible place ourselves in the light that congress enjoyed, look at things as they appeared to it,

and discover its purpose for the language used in connection with the attending circumstances.”

At the time of the passing of the act reserving these lands for the use of schools, and also at the time of the passage of the granting act, a survey was complete for all purposes when approved by the Surveyor General of Oregon. It was not until April 17, 1879, (see *Tubbs v. Wilhoit*, 138 U. S. 134) that by a new regulation of the Land Office the approval of that office was required to complete a survey. It will hardly be contended that a regulation of the Land Office, made for purposes of convenience and possibly to conduce to greater accuracy, could have the effect of changing the meaning of the statutes of Congress enacted twenty and thirty years previously. If this case had arisen in 1875 the court would have held that these lands were sufficiently identified when the Surveyor General of Oregon had approved the plat. The statutes under which the state of Oregon claims have not been altered since 1875. If in 1875 they had one meaning, necessarily they must have the same meaning now. No law of Congress has been, and we believe none can be, cited which authorizes a change in a statute of the United States to be made by a departmental rule.

It appears that the surveys in question were approved by the Surveyor General of Oregon June 2, 1903, two years and a half before the temporary withdrawal by the Secretary of the Interior, and three years and a half before the presidential proclamation. Therefore, at the date of those alleged withdrawals, the lands were vested in the state of Oregon by virtue of the school land grant act and the approval of the Surveyor General of Oregon of the field survey on June 2, 1903.

D.

If approval of survey by the General Land Office was required, such approval was made by the official use of this survey for the purpose of identifying these identical lands.

See cases cited and commented on under point B.

E.

Even if the withdrawal by the Secretary of the Interior had force, that was a temporary withdrawal. The subsequent approval of the survey (Jan. 31, 1906) by the General Land office would bring into force the statutes of 1848 and 1859, which being of higher dignity and greater scope than an executive withdrawal would supersede it and vest the lands in the state of Oregon.

"The action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

Burfenning v. Railroad Co., 163 U.S. 521, 522, and cases cited there.

This act is without exception or qualification. It has never been repealed. The moment the survey was complete the act operated to reserve the lands in question from any other use whatsoever and with the granting act operated to vest title in the state. Certainly it cannot be contended that a mere executive act could have the effect of repealing those statutes. The statutes operate the minute the conditions prescribed exist. The prescribed conditions under all contentions of the government existed January 31, 1906.

F.

The alleged executive withdrawal of these lands, made December 16, 1905, was of no force because if the lands were then surveyed the school land grant had attached, and if they were not surveyed there was no right to withdraw them for forest purposes.

“There can be no reservation of public lands from sale except by reason of some treaty, law or authorized act of the executive department of the government.”

Wolsey v. Chapman, 101 U. S. 769.

The acts of the heads of departments within the scope of their powers are in law the acts of the president.

Idem.

Wilcox vs. Jackson, 13 Peters, 498.

The sole laws authorizing the President to create forest reserves and to withdraw lands for that purpose, are Section 24, Act of March 3, 1891, 26 Stats. 1103 as amended by the act of June 4, 1897, 30 Stats. 3436, and it is under these acts that the reservation for forest uses purports to have been made. (See proclamation of Jan. 25, 1907.) By the acts above cited, the President can set aside only “public lands.” See statutes cited above.

United States v. Blendauer, 122 Fed. 704.

“Public lands” are only such as are open to sale or other disposition under general laws.

Newhall v. Sanger, 92 U. S. 761, 763.

Bardon v. Northern Pac. R. R., 145 U. S. 535, 538.

Barker v. Harvey, 181 U. S. 490.

Lands are not “public lands”, i. e., not open to sale or other disposition under general laws until they are surveyed.

Barnard v. Ashley, 18 How. 43, 46.

Hosmer v. Wallace, 97 U. S. 575, 579.

Buxton v. Traver, 130 U. S. 232, 235.

Now, if the withdrawal or reservation for forest uses can only be made of surveyed lands, i. e., "public lands," then if these lands were unsurveyed on December 16, 1905, as the government now claims, the Secretary of the Interior's withdrawal of that date was unavailing. On the other hand, if on that date the lands in question were surveyed lands, i. e., "public lands," the Secretary of the Interior's withdrawal was equally unavailing, for the reason that the reservation of 1848 and the grant of 1859 took effect on these specific lands as soon as they were identified by survey.

Again, the Secretary's withdrawal was of "vacant, *unappropriated public lands.*" Govt's. Exh. A. Dec. 16, 1905. If these lands were then unsurveyed as claimed by complainant they were not "public lands" and hence not within the terms of the order of withdrawal.

If the lands were then surveyed as we claim, they had *ipso facto* ceased to be "unappropriated." They were expressly "appropriated" to the school grant.

Therefore by the very language of the order of withdrawal, they were not included.

G.

The President's proclamation of January 25, 1907, did not affect these lands because—

(a) At that time the grant was vested in the state of Oregon, and

(b) The proclamation itself expressly excepts the lands in question.

As we have seen, the surveys were approved by the land office January 31, 1906, and by the statute of 1848 were immediately reserved for the use of schools and passed to Oregon under the grant of 1859.

Where lands have been previously reserved or appropriated no subsequent law or proclamation will be construed to embrace them or to operate upon them, although no exception be made in the subsequent proclamation or law.

Bardon v. Northern Pacific, 145 U. S. 535, 539.

Railroad v. Roberts, 152 U. S. 114, 119.

The President's proclamation of January 25th did not as a matter of fact include these lands. On the contrary, by its express terms it excluded them. The proclamation in question contains this clause:

“Excepting all lands which at this date are embraced within any withdrawal or reservation for any use or purpose for which this reservation for forest uses is inconsistent.”

As we have seen, on January 31, 1906, nearly a year prior thereto, the congressional reservation of 1848 had attached to these lands. That reservation was for the use of schools, a use necessarily inconsistent with forest uses. They had also by the act of 1859 been granted for the use of the schools. The intent and effect, both of the act of 1848 and 1859, was to appropriate the lands to Oregon school uses. The lands therefor were directly within the exception in the presidential proclamation.

The learned District Attorney in his brief in the court below says, referring to the words “excepting the withdrawals, reservations,” etc., in the proclamation:

“Those words are used in the proclamation to refer to withdrawals for government purposes, such as Indian reservations, fish hatcheries, military reservations and the like.”

The learned District Judge in his opinion dismisses this point with a brief remark (p. 28) “Nor do I think the lands in dispute were excepted from the operation

of the proclamation." The learned District Judge seems to have given no force or effect whatever to the statute of 1848. The contention of the learned district attorney, that the withdrawals and reservations referred to in the proclamation alluded to withdrawals for governmental purposes, such as Indian reservations, fish hatcheries, military reservations and the like, is untenable. If such had been the intent of the proclamation, the President would have so stated; but the language of the President's proclamation is "*Excepting all lands,*" not some lands but "*all lands embraced within any withdrawals or reservations for any use or purpose for which this reservation for forest uses is inconsistent.*"

The presidential proclamation was unavailing for another reason. At the time it was made the lands had been surveyed, the survey approved and the plat of survey filed in the local land office. The moment that had been done the prior congressional reservation and grant of 1848 and 1859 operated to reserve and grant these lands to the use of the Oregon schools. And under the rule hereinbefore alluded to, that no statute or proclamation will be held to include lands previously reserved or appropriated, the presidential proclamation was of no force as far as these lands were concerned. We ask that the decree below be reversed and that the bill be dismissed.

MARK NORRIS,
Of Counsel for Sligh Furniture Co.

12
UNITED STATES OF AMERICA.

IN THE

**United States Circuit Court
of Appeals,**

FOR THE NINTH CIRCUIT.

W. J. MORRISON, FINLEY MORRI-
SON and SLIGH FURNITURE
COMPANY, a Corporation,

Appellants,

vs.

THE UNITED STATES OF AMER-
ICA,

Respondent.

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IN THE
United States Circuit Court
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NINTH DISTRICT

W. J. MORRISON, FINLEY MORRI-
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RESPONDENT'S BRIEF.

STATEMENT OF FACTS.

The facts in this case, as settled by the stipulation and certified copies of the letters and reports from the Commissioner of the General Land Office are briefly these:

The Act of Congress of February 14, 1859, which was accepted by the State of Oregon on June 3 of the same year, granted to that State Sections 16 and 36 of the public lands of every township in the State. Prior

to May 27, 1902, no survey of any kind had been made by the United States of the lands here in controversy. On the 27th day of May, 1902, a field survey was made of three of the boundaries of these lands, under the direction of the Surveyor General of the United States for the State of Oregon. On June 2, 1902, a field survey was made, under the direction of the same official, of the Northwestern and Southern boundaries of said lands, and according to these surveys the lands which are the subject of this suit were described as Section 16 in Township 3 South, Range 6 East, W. M. This survey was approved by the United States Surveyor General for Oregon on June 2, 1903, and six days later the said Surveyor General sent copies of the plat of survey and field notes to the Commissioner of the General Land Office at Washington, D. C., for approval. This survey was not accepted by the Commissioner of the General Land Office until January 31, 1906, the acceptance being delayed because the Deputy Surveyor did not make the proper observation on polaris required by the regulations of the General Land Office, and because of the further fact that the General Land Office was investigating the question of whether or not the applicants for this survey were actual bona fide settlers. This acceptance on January 31, 1906, was specifically designated *for payment only*, and the Surveyor General for the State of Oregon was directed to refuse any entries in the township until the Commissioner of the General Land Office should give further permission. On November 16, 1907, the Commissioner of the General Land Office directed the Surveyor General to place a plat of the

survey in the local land office at Portland, Oregon, and this plat was filed in the local office at Portland on November 16, 1907. On December 16, 1905, the Secretary of the Interior withdrew from all forms of disposition except under the mineral laws of the United States, for forestry purposes, all lands which are involved in this action. On January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve to include the land above described and involved in this action.

On October 10, 1906, the State of Oregon under its laws providing for the disposal of lands owned by the State, delivered a certificate of sale of the Southwest quarter of said Section 16, above described, to Robert F. Loudon, and also executed and delivered a similar certificate for the South half of the Northeast quarter and the Northwest quarter of the Northwest quarter of Section 16 to Alvira S. Loudon. On January 9, 1907, Robert F. Loudon and Alvira S. Loudon assigned their certificate of sale to the defendants, Finley and W. J. Morrison, and these said defendants, Finley and W. J. Morrison, surrendered their certificates to the State of Oregon in conformity with the state law on January 9, 1907, and on that date the State of Oregon, by its properly constituted officers, executed and delivered to said Finley and W. J. Morrison a deed of conveyance for the lands described as the subject of this action.

POINTS OF LAW.

I.

THE ACT OF CONGRESS GRANTING SECTIONS 16 AND 36 TO THE STATE OF OREGON DID NOT TAKE EFFECT IN PRAESENTI BUT WAS INTENDED TO CONSTITUTE A GRANT IN FUTURO. THESE LANDS WERE THEREBY RESERVED BY THE UNITED STATES FROM ENTRY AND SALE UNDER THE FEDERAL LAWS, BUT IT WAS THE INTENTION OF CONGRESS THAT TITLE SHOULD NOT VEST, AND THAT IT SHOULD RETAIN THE JUS DISPONENDI, UNTIL SURVEY.

Heydenfeldt v. The Daney Gold and Silver Mining Co., 93 U. S. 634.

Minnesota v. Hitchcock, 185 U. S. 373, 400.

Wisconsin v. Hitchcock, 201 U. S. 202.

U. S. v. Thomas, 151 U. S. 577; 38 L. E. 272.

Cooper v. Roberts, 18 Howard 173.

Hibbard v. Slack, 84 Fed. 574.

Clemmons v. Gillette, 3 Mont. 321; 83 Pac. 879.

Middleton v. Lowe, 30 Cal. 596.

Bullock v. Rouse, 22 Pac. 919.

Cooper v. Roberts, 15 L. D. 338.

Periera v. Jacks, 15 L. D. 273.

Gregg v. Colorado, 15 L. D. 151.

State of Colorado, 12 L. D. 70.

In re Miner, 9 L. D. 408.

In re Virginia Lode, 7 L. D. 459.

In re Colorado, 6 L. D. 412.

State of Washington v. Kuhn, 24 L. D. 12.

Todd v. State of Washington, 24 L. D. 106.

South Dakota v. Riley, 34 L. D. 657.

South Dakota v. Thomas, 35 L. D. 171.

Black Hills National Forest, 37 L. D. 469, 473.

State of Montana, 38 L. D. 247, 250.

Boise National Forest, 38 L. D. 224.

California v. Wright, 24 L. D. 54.

State of Oregon, 41 L. D. 259.

State of Washington v. Geisler, 41 L. D. 621.

II.

WHERE A GENERAL LEGISLATIVE POLICY IS SHOWN TO HAVE BEEN ESTABLISHED, IT WILL NOT BE OVERTURNED UNLESS THE INTENT OF THE LEGISLATURE TO THE CONTRARY APPEAR CLEAR. A HISTORICAL REVIEW OF THE LEGISLATION ON THIS SUBJECT WILL SHOW A DEFINITE LEGISLATIVE POLICY IN STATE SCHOOL LAND GRANTS.

A. *Congressional School Land Grants.*

Ohio Act, April 30, 1802 (2 Stat. 173).

Indiana Act, April 19, 1816 (3 Stat. 290).

Illinois Act, April 18, 1818 (3 Stat. 428).
 Alabama Act, March 2, 1819 (3 Stat. 489).
 Missouri Act, March 6, 1820 (3 Stat. 545).
 Arkansas Act, June 23, 1836 (5 Stat. 58).
 Michigan Act, June 23, 1836 (5 Stat. 59).
 Iowa Act, March 3, 1845 (5 Stat. 789).
 Wisconsin Act, August 6, 1846 (9 Stat. 56).
 Minnesota Act, February 26, 1857 (11 Stat.
 166).
 Oregon Act, February 14, 1859 (11 Stat. 383).
 Kansas Act, January 29, 1861 (12 Stat. 126).
 Florida Act, March 3, 1845 (5 Stat. 788).
 California Act, March 3, 1853 (1 Stat. 246).
 Nevada Act, March 21, 1864 (13 Stat. 30).
 Nebraska Act, April 19, 1864 (13 Stat. 47).
 Colorado Act, March 3, 1875 (18 Stat. 474).
 North Dakota)
 South Dakota) Act Feb. 22, 1889 (25 Stat. 676).
 Montana)
 Washington)
 Wyoming Act, July 10, 1890 (26 Stat. 222).
 Utah Act, July 16, 1894 (28 Stat. 107).
 Oklahoma Act, June 16, 1906 (34 Stat. 272).

B. *General Legislation on the Subject.*

Act of February 26, 1859.

Sec. 2275 R. S.

Act of February 28, 1891.

C. *Authorities cited.*

U. S. v. Healey, 160 U. S. 136; 40 L. E. 369.

Morton v. Nebraska, 21 Wall, 660; 22 L. E. 639.

U. S. v. 43 Gallons Whiskey, 108 U. S. 491; 27 L. E. 803.

Ex parte Crow Dog, 109 U. S. 556; 27 L. E. 1030.

Murdock v. Memphis, 20 Wall, 590; 22 L. E. 429.

Ferry v. Street, 4 Utah, 531.

State ex rel Kittel v. Jennings, 47 Fla. 307; 35 So. 986.

Ivanhoe Mining Co. v. Kingston Consolidated Mining Co., 102 U. S. 167; 26 L. E. 126.

Natonia Water Co. v. Bugbey, 96 U. S. 165; 24 L. E. 621.

Sherman v. Buick, 93 U. S. 209; 23 L. E. 849.

Bullock v. Rouse, 81 Cal. 591; 22 Pac. 919.

Gibson v. Robinson, 7 Pac. 428.

Finney v. Berger, 50 Cal. 248.

Medley v. Robertson, 55 Cal. 396.

Gorgan v. Knight, 27 Cal. 522.

Middleton v. Low, 30 Cal. 596.

Hibbard v. Slack, 84 Fed. 575.

Heydenfeldt v. The Daney Gold and Silver Mining Co., 93 U. S. 634; 23 L. E. 995.

Minnesota v. Hitchcock, 185 U. S. 373; 46 L. E. 954.

Layton v. Farrell, 11 Nev. 451.

Clemmons v. Gillette, 33 Mont. 321; 83 Pac. 879.
 U. S. v. Birdseye, 37 Pac. 516.
 Barnhurst v. Utah, 30 L. D. 314.
 Gregg et al. v. Colorado, 6 L. D. 412.
 South Dakota v. Riley, 34 L. D. 657.
 South Dakota v. Thomas, 35 L. D. 171.
 Black Hills National Forest, 37 L. D. 469.
 State of Montana, 38 L. D. 247.

III.

NO TITLE TO SAID SECTIONS 16 AND 36
 COULD PASS TO THE STATE OF OREGON
 UNTIL AFTER SURVEY BY THE UNITED
 STATES, AND TO CONSTITUTE A SURVEY
 SUCH AS WOULD OPERATE TO VEST THE
 GRANT THERE MUST BE

- (a) A MARKING OF THE LANDS ON
THE GROUND,
- (b) APPROVAL OF THE SURVEYOR
GENERAL, OR, SINCE APRIL 17, 1879,
- (c) THE APPROVAL OF THE COMMIS-
SIONER OF THE GENERAL LAND
OFFICE AND THE SECRETARY OF
THE INTERIOR.

U. S. v. Mont. Lumbering and Mfg. Co., 196 U.
 S. 573.

32 Stats. 1006.

Cosmos Co. v. Gray Eagle Co., 190 U. S. 301.

Knight v. U. S. Land Assn., 142 U. S. 161.

Magwire v. Taylor, 2 Black, 17 L. E. 137.
 6 Copp's Land Owner, 136.
 S. P. R. R. Co. v. Burlingame, 5 L. D. 415, 417.
 Cal. v. Wright, 24 L. D. 54, 57.
 Anderson v. Minn., 37 L. D. 390, 392.
 South Dakota v. Riley, 34 L. D. 657, 659.

IV.

PRIOR TO SURVEY TITLE TO SECTIONS
 16 AND 36 REMAINS IN THE UNITED
 STATES, TOGETHER WITH THE RIGHT
 TO DISPOSE OF SUCH UNSURVEYED
 LANDS AS MIGHT OR MAY BECOME SEC-
 TIONS 16 OR 36 UPON SURVEY.

Heydenfeldt v. The Daney Gold and Silver Min-
 ing Co., 93 U. S. 634; 23 L. E. 995.
 Minn. v. Hitchcock, 185 U. S. 373; 46 L. E. 954.
 Wis. v. Hitchcock, 201 U. S. 202.
 Hibbard v. Slack, 84 Fed. 571.
 State v. Montana, 38 L. D. 247.

V.

THE EXECUTIVE WITHDRAWAL FROM
 ENTRY OR ANY FORM OF DISPOSITION,
 EXCEPT UNDER THE MINING LAWS OF
 THE UNITED STATES, MADE BY THE SEC-
 RETARY OF THE INTERIOR ON DECEM-
 BER 16, 1905, IS A LEGAL WITHDRAWAL OF
 THE LANDS HERE INVOLVED AND OPE-

RATED TO PLACE THEM WITHOUT THE OPERATION OF THE GRANT UPON SUBSEQUENT APPROVAL OF THE SURVEY.

U. S. v. Blendauer, 122 Fed. 703, 707.

Wilcox v. Jackson, 13 Peters 498; 10 L. E. 264.

Wolsey v. Chapman, 101 U. S. 755; 25 L. E. 915.

U. S. v. Mason, County Court, 145 U. S. 202, 217; 36 L. E. 544.

U. S. v. Grimauld, 220 U. S. 506.

Light v. U. S., 220 U. S. 523.

ARGUMENT.

THE ACT OF CONGRESS GRANTING SECTIONS 16 AND 36 TO THE STATE OF OREGON DID NOT TAKE EFFECT IN PRAESENTI BUT WAS INTENDED TO CONSTITUTE A GRANT IN FUTURO. THESE LANDS WERE THEREBY RESERVED BY THE UNITED STATES FROM ENTRY AND SALE UNDER THE FEDERAL LAWS, BUT IT WAS THE INTENTION OF CONGRESS THAT TITLE SHOULD NOT VEST, AND THAT IT SHOULD RETAIN THE JUS DISPONENDI, UNTIL SURVEY.

Stated simply, the entire question presented in this case is whether the State of Oregon, on or before October 10, 1906, had title to Section 16 in Township 3 South, Range 6 West of the Willamette Meridian, or

any part thereof, so that it could convey those lands to which the defendants now claim title. In determining this question, we must examine the language of the statute granting the so-called school sections to the State of Oregon. This is found in the Act of Congress of February 14, 1859 (11 Stat. 383), which was accepted by the State of Oregon June 3, 1859, and reads as follows:

“That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of the schools.”

The first question to be discussed is, Was this intended as a grant to take effect immediately, or one to take effect *in futuro*? If it took effect upon acceptance by the State of Oregon in 1859 then there is no question that the defendant's contention is correct. If, however, this was not intended as a grant *in praesenti*, but one *in futuro*, as the plaintiff insists, then the defendants have no claims or interest whatsoever in the land described, since the original grantor, the State of Oregon, had no title; for a deed is void if the grantor State had no title to the premises embraced in it (Knight v. United Land Association, 142 U. S. 161).

The plaintiff and respondent contends that this was a grant *in futuro*, which could not possibly take effect until a complete survey had been made by the United States in accordance with its regulations, and the sec-

tions identified; that no title passed to any lands until their boundaries were determined by properly designated authorities.

Note the language of the Act granting these lands:

“* * * where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, *shall be granted* to said State for the use of schools.”

A consideration of this language makes it evident that Congress considered that sections sixteen and thirty-six might be otherwise disposed of or reserved, and therefore it provided for lands in lieu thereof, none of which could possibly be ascertained without a survey. Indeed it could not be known until after a survey was completed where these sections would fall, and so Congress substituted a like quantity of lands for those identical sections, if it should prove impossible to grant them. How could the location be determined, or the grant take effect, except upon survey, and if Congress had intended to grant those sections *in praesenti*, why should it take the precaution to provide for substituting other sections? In construing a somewhat similar statute granting school lands to Nevada, which is hereinafter quoted, the Supreme Court, in *Heydenfeldt v. The Daney Gold and Silver Mining Company*, 93 U. S. 634, said:

“There was no occasion of making provision for substituted lands, if the grant took effect absolutely on the admission of the State into the Union, and the title to the lands then vested in the State. Congress cannot be supposed to have intended a vain thing, and

yet it is quite certain that the language of the qualification was intended to protect the State against a loss that might happen through the action of Congress in selling or disposing of the public domain. It could not, as we have seen, apply to the past sales or dispositions, and to have any effect at all, must be held to apply to the future."

In granting these lands to the State of Oregon, Congress did not say those sections are "hereby granted," as it did in the Nevada Act, but it employed the words "shall be granted," indicating a condition to be performed before the State could secure title.

The Act which granted the school lands to the State of Nevada is as follows (13 St. at Large, 32) :

"That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any Act of Congress, other lands equivalent thereto in legal subdivisions of not less than a quarter section, and as contiguous as may be, *shall be* and the same *are hereby granted* to the said State for the support of common schools."

Note that the words "shall be and are hereby granted" are used in the Nevada Act, which would far stronger imply a grant *in praesenti* than the language of the Oregon Act, yet the Supreme Court in *Heydenfeldt v. The Daney Gold and Silver Mining Company*, *supra*, said:

(page 638) "It is true that there are words of present grant in this law; but, in construing it, we

are not to look at any single phrase of it, but to its whole scope, in order to arrive at the intention of the makers of it. 'It is better always,' says Judge Sharsword, 'to adhere to a plain, common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction.' *Gyger's Estate*, 65 Penn. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment. With these rules as our guide, it is not difficult, we think, to give a true construction to the law under consideration.

Congress, at the time, was desirous that the people of the Territory of Nevada should form a State government, and come into the Union. The terms of admission were proposed, and, as was customary in previous enabling acts, the particular sections of the public lands to be donated to the new State for the use of common schools were specified. These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the national domain within that Territory.

But this condition of things did not deter Congress from making the necessary provision to place, in this respect, Nevada on an equal footing with States then recently admitted. Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known

until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. In the meantime, further improvements would be arrested, and the persons, who prior to the surveys had occupied and improved the country, would lose their possessions and labor, in case it turned out that they had settled upon the specified sections."

The decision of the case of *Heydenfeldt v. The Daney Gold and Silver Mining Company* has been approved in many subsequent cases. Justice Brewer, in delivering the opinion in *Minnesota v. Hitchcock*, 185 U. S. 373, 400, said, in referring to that case:

"Although the terms of the school-land section were terms of present grant, and although the entry by the defendant was after the State had been admitted, yet his title was adjudged superior to that obtained from the State, the court holding that the United States had full power to dispose of the land until after a survey and the identification thereby".

The Act of Congress (U. S. R. S. Sec. 1946) establishing territorial government in Utah contains this language:

"When the lands in said territory (Utah) shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections sixteen and thirty-six in

each township in said territory shall be, and the same are, hereby reserved for the purposes of being applied to the schools."

The Supreme Court of Utah, after reviewing some of the decisions above referred to, in *Ferry v. Street*, 4 Utah 521; 11 Pac. 571, 576, which involved the construction of that statute, said:

"The decisions of the Supreme Court of the United States established the following propositions of law:

"First, that the various Acts of Congress mentioned reserving the portions of the public lands of the United States to the territories or states, for the benefit of their people, vest the title of such lands so reserved in the states or territories *when the lands are surveyed*, or when they are bounded. Until such time the obligation is executory, and the title remains in the Federal Government."

In the case at bar, the plaintiff's contention is far stronger than it could be under the Nevada or Utah grants, for in the Oregon Act words of present grant are omitted. The language is much weaker in the Oregon Act than in the Nevada Act, yet it is no longer questioned that even the Nevada Act did not grant the lands until after a survey, and here the plaintiff is favored again. If a present grant were meant, then why were not words capable of such clear interpretation used? The court may look at surrounding circumstances and conditions obtaining at the time, in determining the construction to be given a statute (*Platt v. Union Pacific Railroad Company*, 99 U. S. 48). Statutes conveying

lands to states had been in litigation for a decade previous to the passage of the Oregon Act, arising over the question of whether a present or future grant was intended. This fact was well known, and Congress in the face of that, studiously avoided the use of words making the grant *in praesenti*. In fact, it failed to use the words "hereby granted," but employed words of future grant, "shall be granted." This omission to use words clearly meaning a present grant is significant. The only conclusion to be drawn is that a different intendment was meant, and a present grant was not given to Oregon. In construing the Act granting the school sections to Minnesota (11 Stat. at Large, 166), the language of the granting portion of which is identical with the Oregon Act, the Supreme Court said, in *Minnesota v. Hitchcock*, *supra*:

(p. 392) "Again the language of the section does not imply a grant *in praesenti*. It is 'shall be granted,' " and (page 401) "In other words, the Act of Admission, with its clause in respect to school lands, was not a promise by Congress that under all circumstances either then or in the future, the specific school sections were or should become the property of the State. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision was made for a selection of other lands in lieu thereof."

When the Act of 1859 was passed, the land in Oregon was unsurveyed and the same situation existed here as existed in Nevada. The phrase "and where either of the said sections, or any part thereof, has been sold or otherwise disposed of" did not refer to a disposal prior to

the passage of the Act; for, as the Supreme Court says in the Heydenfeldt case, *supra*:

“These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the public lands.”

The Heydenfeldt case is also quoted with approval in the case of *The New York Indians v. The United States*, 170 U. S. 1, page 18, and in that case the court held that, under the doctrine of the Heydenfeldt case, where there was uncertainty as to the lands granted, the Act was a grant *in futuro*. And in a learned opinion by the Supreme Court of Washington in the case of *The State v. Whitney, et ux.*, 120 Pac. 116, 117, it is said:

“Prior to the grant of California in 1853 the words used to indicate the grant were ‘shall be granted.’ These words have uniformly been held to signify the intention of Congress to make a grant *in futuro* to become effective when the lands were subject to identification by survey. * * * The words ‘hereby granted’ indicate a grant *in praesenti* and pass not a special or limited interest in the land, but are words of absolute donation and vest a present title subject only to survey to give precision to the grant and attach it to any particular tract.”

The contention of counsel is that Congress gave to Oregon a grant of sections 16 and 36 by a grant *in praesenti* and that thereby all lands surveyed or unsurveyed became segregated from the public domain and beyond the future disposal of Congress. They rely upon the cases of

Beecher v. Wetherby, 95 U. S. 517;

Cooper v. Roberts, 18 Howard 173; and

Ham v. Missouri, 18 Howard 126.

In the Beecher case a patentee of the Government brought suit against a patentee of the State of Wisconsin for the value of saw-logs cut from section 16. The Supreme Court held that this land, which had been originally occupied by the Menomonee Indians, had been abandoned by them *subsequent to a survey* of the lands, and that therefore, while title to the school sections so occupied by the Indians did not pass under the Wisconsin grant so long as such rightful Indian occupancy continued, at a time after survey and before the trespass sued for, "*no legal impediment existed to the complete investiture of the title of the State,*" and that the United States, *after a survey* and the investment of title in the State through abandonment by the Indians, could not then otherwise dispose of section 16. It is interesting to note that counsel for the patentee of the State did not consider the Heydenfeldt case as stating a different doctrine from that for which he contended, but on page 521 he cites the Heydenfeldt case as authority for his contention, and further acknowledged that the Act of Congress of August 6, 1846, which gave to the State of Wisconsin sections 16 and 36, *did not* constitute a present grant, but was in the nature of an executory agreement.

The Beecher case was founded upon the case of Cooper v. Roberts, *supra*, which was a suit in ejectment by the patentee of the State of Michigan against a mineral claimant claiming to hold under a license from the

Federal Government confirmed by the Act of March 1, 1847.

The Act granting Michigan the school lands was passed June 23, 1836. The defendant took possession of the same in 1844. The land was surveyed in 1847 and patented by the State to the plaintiff's predecessors in 1851. Says the court:

"We agree that until the survey of the township and the designation of the specific section the right of the State rests in compact, binding, it is true, the public faith and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land that shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, *and if there is no legal impediment the title* of the State becomes a legal title. 'The *jus ad rem* (a right to a thing without possession), by the performance of that executive act, becomes a *jus in re* (a right to a thing implying possession), judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

The question then arose whether the Act of March 1, 1847, created a legal impediment to the operation of this principle, either by the reservation of the land for public uses, or by its appropriation to superior things. It will be noticed that the court there recognizes the right in Congress, *eleven years after the passage of the enabling act*, to reserve the lands for public uses or appropriate it to superior claims. The court held that Congress excepted from the operation of the Act of March, 1847,

such mineral lands as might be found on section 16. The court asks this question (page 180) :

“Did the execution of the lease by the Secretary of War, in 1845, *before the survey of the lands*, dispose of these lands so as to defeat the claim of the State?”

and answers the question thus:

“The lease expired by ‘efflux of time,’ in September, 1848. There was no renewal of the lease, for the double reason, that its original validity was doubted by the highest executive authority, and those doubts were submitted to by the lessee, and because Congress had passed the law for the disposal of the mineral lands, which determined the covenant for the renewal, by the terms of the lease itself.

Hence, had there been a legal impediment to the execution of the compact with Michigan, erected either by the second section of the Act of 1847, which separated for some purposes the mineral from other public lands, or by the privileges granted to the lessees or their assigns, in the 3d section of that Act, it was removed by the repealing clause of the Act of 1850, and the non-compliance with the conditions upon which the privileges depended. The section No. 16 was, *at that date, disencumbered*, and subject to the operation of the compact, whatever might have been its pre-existing state.”

The Court’s attention is invited to the fact that nowhere in *Cooper v. Roberts* is there a hint of any lack of power of Congress to otherwise dispose of the lands prior to survey. But there is an express acknowledgment that Congress could create a legal impediment subsequent

to the enabling act and prior to the survey; and instead of dating the State's title from the date of the enabling Act of 1836, or from the date of the survey in 1847, it dates the State's rights from the removal of the legal impediment by the Act of 1850. We come back then to a determination of *what was the intention of Congress* when it used the words—"shall be granted" and when it passed the Act of February 14, 1859, the enabling act for the State of Oregon.

Congress is itself the best judge of its intentions. It knew whether or not the grant was an absolute one of unsurveyed lands as well as surveyed lands. It knew whether or not it would retain power to dispose of unsurveyed lands prior to survey. If counsel's contention is correct, the State's rights attach to unsurveyed lands the moment the enabling act was passed and Congress could not dispose of unsurveyed public lands, and unless the same were within a reservation at the time the enabling act was passed, it could make no disposition of the lands. Ingenious and able as counsel's contention is, it is absolutely refuted by the action of Congress itself. If the grant to the State was absolute, Congress could not grant to a pre-emptioner or homesteader any preference rights on unsurveyed lands which might thereafter be found to be sections 16 and 36. But on February 26, 1859, (11 Stats. 385), twelve days after the passage of the act for the admission of Oregon into the Union, and on the succeeding page in the statute books, Congress said:

"That where settlements with a view to pre-

emption have been made before the survey of the lands in the field which shall be found to have been made on sections 16 or 36, said sections shall be subject to the pre-emption claim of such settler."

This enactment was included as section 2275 in the Revised Statutes. By the Act of February 28, 1891, Section 2275 was amended and contains the following provision:

"And other lands of equal acreage are also hereby appropriated and granted and may be selected by said state or territory where sections 16 or 36 are mineral land or are included within any Indian, military or other reservation, or otherwise disposed of by the United States; provided, where any state is entitled to said sections 16 and 36, or where said sections are reserved to any territory, notwithstanding the same may be mineral lands or embraced within a military, Indian or other reservation, the selection of such lands in lieu thereof by the state or territory shall be a waiver of this right to said sections and other lands of equal acreage are also hereby appropriated and granted and may be selected by said state or territory to compensate deficiencies for school purposes where sections 16 or 36 are fractional in quantity or where one or both are wanting by reason of the township being fractional or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior without awaiting the extension of the public surveys, to ascertain and determine by protraction or otherwise the number of townships that will be included within such Indian, military or other reservations, and thereupon the state or territory shall be entitled to select the indemnity lands to the extent of two sections for each said townships in

lieu of sections 16 and 36 therein; but such sections may not be made within the boundaries of said reservations."

The reservations referred to in the Act last cited and noted mean those reservations which were formed prior to the survey; because, even by counsel's contention, the enabling act provided for those dispositions of sections 16 and 36. It would be a vain thing for Congress to make two enactments to cover the same subject matter. "Congress cannot be supposed to have intended a vain thing." (Heydenfeldt v. The Daney Gold, etc. Co., *supra*.)

Therefore the Act of February 28, 1891, refers to those reservations which may be made prior to the time of the survey of the land.

In administering the public land laws it has been the uniform opinion of the Department of the Interior that the title to sections 16 and 36 does not vest in the State until the lands are identified by survey and that the date of the survey is fixed, not by the time the work is done in the field, but by the approval of the township plat by proper authorities. If this contention is a correct one, the State of Oregon has used thousands of acres of school indemnity scrip for which the base was unsurveyed public lands within the boundaries of a National Forest, and we take it that no court will adopt a construction of an act which is contrary to the wording of the act itself, to the construction given to it by later enactments, to the approval of the Land Department of the United States and to the decisions of the Supreme Court of the

United States in the Heydenfeldt and Minnesota cases, and which construction has been accepted and acted upon by the State of Oregon itself in hundreds of cases. In leaving this particular phase of the question, we close with the language of the court in the Heydenfeldt case, *supra*:

“Congress, however, reserved until this (survey of the land) was done the power of disposition, and if in the exercise of this power the whole or any part of a sixteenth or thirty-sixth section has been disposed of, the State was to be compensated by other lands equal in quantity and as near as may be in quality.”

And plaintiff therefore insists that the Act which granted sections 16 and 36 to the State of Oregon did not take effect immediately, but that title to the lands involved in this action remained in the United States, and the State of Oregon had no legal title whatever to the lands it attempted to convey.

WHERE A GENERAL LEGISLATIVE POLICY IS SHOWN TO HAVE BEEN ESTABLISHED, IT WILL NOT BE OVERTURNED UNLESS THE INTENT OF THE LEGISLATURE TO THE CONTRARY APPEAR CLEAR. A HISTORICAL REVIEW OF THE LEGISLATION ON THIS SUBJECT WILL SHOW A DEFINITE LEGISLATIVE POLICY IN STATE SCHOOL LAND GRANTS.

It is a proposition of law well settled by the Federal Courts, including the Supreme Court of the United

States, that where it is shown that Congress has adopted a well-settled line of legislative policy in dealing with matters of great public interest, such policy will not be departed from in construing legislative enactments upon the same subject, unless a contrary intent clearly appear. Whenever a statute is open to construction, it would appear that legislative policy, deduced from a long established line of consistent legislation in dealing with similar questions, is a legitimate factor in arriving at the Congressional intent. Numerous decisions of the courts support this view, and it is hardly necessary to cite cases to establish it. The rule has been applied by the United States Supreme Court relative to the policy of Congress in the interpretation of a great variety of statutes; to the policy of encouraging settlement of lands along the line of railroads aided by land grants (*U. S. v. Healy*, 160 U. S. 136, 40 L. Ed. 369); reserving from sale salt springs in territories eventually to be organized into states (*Morton v. Nebraska*, 21 Wall. 660; 22 L. Ed. 639); preventing the introduction of intoxicating liquors into the Indian Country (*U. S. v. 43 Gallons Whiskey*, 108 U. S. 491; 27 L. Ed. 803); and exempting tribal Indians from the operation of general penal enactments affecting white persons (*Ex Parte Crow Dog*, 109 U. S. 556; 27 L. Ed. 1030). And it will be noted that in cases where the courts have held that the terms of the statute varied the prior legislative policy, they have held that such policy is not to be regarded as abandoned further than the terms and objects of the new legislation unmistakably require. (*Murdock v. Memphis*, 20 Wall. 590; 22 L. Ed. 429).

An examination of the entire series of state school grants, and of the construction uniformly placed upon them by the courts, will tend to show a definite line of policy on the part of Congress in making these enactments. And a scrutiny of the two sections of the Act of February 14, 1859 (11 Stat. L. 383) relative to the grant of lands for school purposes to the State of Oregon, fails to show that it was intended to except it from the general line of legislative policy. A brief review of the legislation prior to and existing at the time of the passage of this act will be helpful in its consideration.

By Sec. 14, of the Act of March 3, 1863 (12 Stat. L. 814), Congress provided that

“when the lands in the Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into the market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereinafter to be erected out of the same.”

This provision was afterward embodied in Sec. 1846 of the Revised Statutes. It is well settled that this provision did not pass any title, or prohibit settlement in such lands prior to survey. (*Ferry v. Street*, 4 Utah 531; *Barnhurst v. Utah*, 30 L. D. 314.) Indeed, by the express words of the Act, it was to become operative only upon survey. However, since it only provides for the Territory, and the question now under consideration is the grant to the State, we need not dwell upon this provision further at this time.

In reviewing the grants to the specific states upon their admission to the Union, we find great uniformity in the language of Congress. The grant to Ohio (Act of April 30, 1802, 2 Stat. L. 175) is in the following language:

“That sections sixteen and thirty-six in every township and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools.”

The grant to Kansas (Sec. 3, Act of January 29, 1861, 12 Stat. L. 126) is as follows:

“That sections numbered sixteen and thirty-six in every township of public lands in the said State, and where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands, equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.”

With two exceptions, the language of one or the other of the above clauses was used in all grants up to 1861. See the grants to: INDIANA, Act of April 19, 1816 (3 Stat. L. 290); ILLINOIS, Act of April 18, 1818 (3 Stat. L. 428); ALABAMA, Act of March 3, 1819 (3 Stat. L. 489); MISSOURI, Act of March 6, 1820 (3 Stat. L. 545); ARKANSAS, Act of June 23, 1836 (5 Stat. L. 58); MICHIGAN, Act of June 23, 1836 (5 Stat. L. 59); IOWA, Act of March 3, 1845 (5 Stat. L. 789); WISCONSIN, Act of August 6, 1846

(9 Stat. L. 56) ; MINNESOTA, Act of February 26, 1857 (11 Stat. L. 166) ; OREGON, Act of February 14, 1859 (11 Stat. L. 383).

The two exceptions mentioned, in which Congress departed from the theretofore customary language, during the period prior to the year 1861, were in the grants of Florida and to California.

The grant to Florida (Act March 3, 1845, 5 Stat. L. 788), is as follows:

“That in consideration of the concessions made by the State of Florida in respect to the public lands, there *be granted* to the said State eight entire sections of land for the purpose of fixing their seat of Government; also section numbered sixteen in every township, or other lands equivalent thereto, for the use of the inhabitants of such township, for the support of public schools.”

The effect of this grant was considered by the Supreme Court of Florida in *State ex rel v. Jennings*, 47 Fla. 307; 35 So. 986, and the Court, after an elaborate review of the authorities, held that the grant was:

“A special grant *in praesenti* of every sixteenth section in every township *which previous to survey had not been disposed of under legal authority from the Government of the United States.*”

Here is a recognition by the court that, although the language of the grant is *in praesenti*, it *does not operate to vest title* until survey.

The material portions of the grant to the State of

California (Act March 3, 1853; 10 Stat. L. 246) are as follows:

“Sec. 6. *And be it further enacted*, That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and *hereby are granted* to the State for the purpose of public schools in each township, and with the exception of lands appropriated under the authority of this act; or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions and limitations therein, except as herein otherwise provided.”

“Sec. 7. *And be it further enacted*, That where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authority of the State in lieu thereof, agreeably to the provisions of the Act of Congress approved on the twentieth day of May, eighteen hundred and twenty-six, entitled ‘An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for’ and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by com-

petent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands."

This Act has been repeatedly before the Supreme Court of the United States (See *Ivanhoe Mining Co. v. Kingston Consolidated Mining Co.*, 102 U. S. 167, 26 L. Ed. 126; *National Water Co. v. Bugbey*, 96 U. S. 165; 24 L. Ed. 621; *Sherman v. Buick*, 93 U. S. 209; 23 L. Ed. 849), and the Supreme Court of California (See *Bullock v. Rouse*, 81 Cal. 591; 22 Pac. 919, *Gibson v. Robinson*, 7 Pac. 428, *Finney v. Berger*, 50 Cal. 248, *Medley v. Robertson*, 55 Cal. 396, *Grogan v. Knight*, 27 Cal. 522, *Middleton v. Low*, 30 Cal. 596), and it has been uniformly held not to be a grant *in praesenti*, but that prior to survey the United States had full power of disposition over sections sixteen and thirty-six, and by the exercise of such power these sections might be lost to the State. (See *Hibbard v. Slack*, 84 Fed. 575.)

It may be considered that the provision of Sec. 7 of the Act granting lands to the State of California had a controlling effect, in this respect, upon the construction of that act; and it is to this point, that we particularly desire to call attention, since it embodied provisions, which, in somewhat similar form, were shortly thereafter enacted into a permanent statute, and consequently became a part of all school grants thereafter made by Congress. We refer to the Act of February 26, 1859 (11 Stat. L. 385), which is as follows:

"Where settlements, with a view to pre-emption,

have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any other natural cause whatever."

It will be observed that the terms of this statute expressly cover both the past and future, so that it is a clear declaration by Congress of both its understanding that it retained the *jus disponendi* of the unsurveyed lands in the States theretofore created, and its intention to continue to retain it in the future. It may be noted in passing that this statute was enacted very shortly after the admission of Oregon into the Union (Act of February 14, 1859, 11 Stat. L. 383), and that Oregon and Kansas, which was admitted in 1861 (Act of January 29, 1861, 12 Stat. L. 126) were the last States whose grants followed what may be termed the old form.

The grants next in chronological order are those to Nevada (Act of March 21, 1864, 13 Stat. L. 30) and to Nebraska (Act of April 19, 1864, 13 Stat. L. 47). Both of these are in identically the same language, as follows:

"Sec. 7. *And be it further enacted*, That Sections

number sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any Act of Congress, other lands equivalent thereto in legal subdivisions of not less than one quarter section and as contiguous as may be, shall be and are hereby granted to said State for the support of common schools."

This grant to Nevada was construed by the Supreme Court of the United States in *Heydenfeldt v. Daney, etc. Mining Co.*, 93 U. S. 634, 23 L. Ed. 995. It was there held that the grant did not take effect until the status of the land was fixed by survey, and that until that time Congress reserved the power of disposition over the unsurveyed lands. This decision was subsequently quoted with approval in *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954, at p. 967. The grant was also before the Supreme Court of Nevada in *Layton v. Farrell*, 11 Nev. 451, and that court followed *Heydenfeldt v. Daney, supra*. In this case Mr. Justice Beatty, in a separate concurring opinion, based his decision upon the effect of the Act of February 26, 1859 (11 Stat. L. 385), set out above.

The grant to Colorado (Act of March 3, 1875, Stat. L. 475) is in the same language as the grant to Nevada, above, with the exception that where the latter act uses the words "shall be" and "are hereby granted" the grant to Colorado merely uses the words "are hereby granted." It may be noted that this is the first act in which Congress placed a limitation upon the power of the State to dispose of its school lands. A comparison of the grant to this State with the grants to the other States will

show that it is perhaps, of all grants made by Congress, the one most susceptible of being construed as a grant *in praesenti*. However, the Secretary of the Interior, in construing it in 15 L. D. 151, after reviewing the decision of the Supreme Court, held:

“The principle distinctly announced by the court is, that until the status of the land is actually fixed by survey, as shown by the township plat, so that the grant may attach to the specific section, the government has the absolute power to dispose of it as a part of the public domain, and to provide for its disposal in any manner that may promote the public interest.”

And Secretary Lamar, in 6 L. D. 412, held that:

“Where the fee is in the United States at the date of survey and the land is so encumbered that full and complete title and right of possession cannot then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, and it may wait until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.”

The Act of February 22, 1889 (25 Stat. L. 676)

providing for the admission of the States of North Dakota, South Dakota, Montana and Washington, and making grants of school lands to these states, contained the following provisions:

“Sec. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof,

have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in the Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain. 25 Stat. L. 679, 52 L. Ed. 340. 53 L. Ed. 118.”

“Sec. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed, or unsurveyed, but shall be reserved for school purposes only (25 Stat. L. 679) 52 L. Ed. 340; 53 L. Ed. 118.”

These provisions are practically identical with those of the grant to Idaho, except that the proviso in Sec. 10 of the above Act does not appear in the grant to Idaho. The Act was construed by the Secretary of the Interior in *South Dakota v. Riley*, 34 L. D. 657, *South Dakota v. Thomas*, 35 L. D. 171, *Black Hills National Forest*, 37 L. D. 469, and *State of Montana*, 38 L. D. 247, where it was held that the grant does not take effect as to any specific tracts until survey and that the United States has reserved the *jus disponendi* until that time. To the same effect is the decision of the Supreme Court of Montana in *Clemmons v. Gillette*, 33 Mont. 321, 83 Pac. 879.

The grants to Wyoming (Act of July 10, 1890; 26 Stat. L. 222); Utah (Act July 16, 1894; 28 Stat. L. 107); and Oklahoma (Act June 16, 1906; 34 Stat. L. 272) are all subsequent to the grant to Idaho, and are substantially in the same terms as the grant to that state. The grant to Utah was discussed in *Barnhurst v. Utah*, 30 L. D. 314, where the Secretary of the Interior allowed a desert land claim upon unsurveyed land, filed subsequently to the Utah grant, but prior to its admission as a State, to go to patent. While this case is not exactly in point, on account of the fact that the State was not in existence at the time of the filing, yet it is valuable as showing that the words "where such sections or any parts thereof have been sold or otherwise disposed of by or under authority of any act of Congress" has a *future* as well as a past application, and thus serves to show the general legislative policy of reserving the

right to dispose of the lands pending survey had not been abandoned.

It will thus be seen that in a consistent line of statutory grants, Congress has clearly indicated a legislative policy to retain the *jus disponendi* in its own hands pending the survey and vesting of title to school lands, and this view is further strengthened by the consideration of certain general legislation upon this subject.

The Act of February 26, 1859 (11 Stat. L. 385) has been previously referred to herein. This provision was reenacted in Section 2275 Revised Statutes, in the following language:

“Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands or like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.” Act of February 6, 1859, ch. 58, 11 Stat. L. 385.

This was considered in *Ferry v. Street*, 4 Utah 531, in which the court said:

“Sec. 2275, Rev. Stat. U. S. shows clearly that

the understanding of Congress was that title should not vest in the territory or state before the survey. It is where settlements with a view to pre-emption have been made before the survey of the lands in the field, which are found to have been made on sections 16 or 36 those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the land lies, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emption, and other lands are also appropriated to compensate deficiencies for school purposes, where sections 16 or 36 are fractional in quantity, or where one or both are wanting, by reason of the township being fractional, or for any natural causes whatever."

Of course, the point under discussion by the Court was the right acquired by a pre-emption claimant, but the language of the court expressly states that the right to dispose of the lands prior to survey remained in the United States. On this point the court said:

"When a person settled on the public lands with a view to pre-emption, this section gives him a right to patent, notwithstanding the land turns out, when surveyed, to be sections 16 or 36, or a part thereof. *The title and the right to dispose thereof is regarded as in the United States til the survey.* If not, why transfer it by patent to the preemptor? Those sections, or their equivalent in other lands, are regarded as pledged for school purposes. The language of the law is 'reserved or pledged.' The term 'reserved' is regarded as synonymous in meaning with 'pledged.'"

This case was subsequently appealed to the Supreme Court of the United States, but dismissed for lack of jurisdiction: *Street v. Ferry*, 119 U. S. 385.

It next becomes necessary to consider the Act of February 28, 1891, which amended Section 2275, R. S. to read as follows:

“Sec. 2275. Where settlements, with a view to pre-emption or homestead, have been or shall hereafter be made, before the survey of the lands in the field, which are found to have been on sections 16 or 36, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections 16 and 36 are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections 16 and 36, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes where

sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of sections 16 and 36 therein; but such selections may not be made within the boundaries of said reservations; *Provided*, however, that nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservations, and the restoration of the lands therein embraced to the public domain and then taking the sections 16 and 36 in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

While the Act of 1891 modifies Section 2275 in that the indemnity to be selected may be taken anywhere within the limits of the State, yet the language by which it has been held to operate *in futuro*, as well as retroactively, is not changed; and this law was enacted with the judicial construction which had been placed upon the prior laws before the eyes of Congress. The familiar rule that where words have been judicially interpreted their use in subsequent legislation will be deemed to be with their judicial meaning in view, appears to be applicable here.

It would, therefore, appear that nowhere in the en-

tire course of the school land legislation has it been held that the states acquired any vested interest in the land prior to the survey, that would prevent its disposition by the United States, before the official survey vested the title. As the sections are created, and not identified by the survey, there can be no subject matter to which the grant can attach, and vest an interest (*U. S. v. Birdseye*, 37 Fed. 516.)

The entire series of granting acts, taken together with the lieu selection acts above referred to, clearly indicate that Congress, from the first school land grant, has been following a definite, consistent line of legislative policy relative thereto. Unless the language of the grant to the State of Oregon shows clearly and unmistakably that it was the legislative intent to depart from this policy in the grant to that State, no such intent should be read into the law. An examination of the Oregon grant shows no manifestation of a clear and unmistakable intent on the part of Congress to change its general legislative policy on this subject. Indeed, the language there used, would appear to be more susceptible of a construction in line with the previous and subsequent construction of other grants than it would be of a construction differing therefrom. In any event, it can only be urged that the language is doubtful, and subject to various different constructions, and under the rule laid down by the previously cited authorities, this is not sufficient to change a known legislative policy.

NO TITLE TO SAID SECTIONS 16 AND 36
COULD PASS TO THE STATE OF OREGON

UNTIL AFTER SURVEY BY THE UNITED STATES, AND TO CONSTITUTE A SURVEY SUCH AS WOULD OPERATE TO VEST THE GRANT THERE MUST BE

- (a) A MARKING OF THE LANDS ON THE GROUND
- (b) APPROVAL OF THE SURVEYOR GENERAL, OR, SINCE APRIL 17, 1879,
- (c) THE APPROVAL OF THE COMMISSIONER OF THE GENERAL LAND OFFICE AND THE SECRETARY OF THE INTERIOR.

Having concluded that in effect the grant was one *in futuro*, and title to the lands did not immediately pass, let us now consider whether title to the section 16, which is the subject of this action, has since passed to the State of Oregon, and, if so, when.

What is necessary for title to pass? What acts must be done before the State can come into possession of these school sections? There must first be a segregation of these so-called school sections before any title can attach. The Commissioner of the General Land Office has decided, and the courts have held, that the grants of sections 16 and 36 to the states does not vest until a survey has been completed. The Secretary of the Interior in 34 L. D. 657, 659, said:

“Reservations are not infrequently made of unsurveyed lands. Before survey, what lands pass to

the State by its grant are impossible of identification. It has always been the rule of construction of school land grants to the States that the right to any particular tract of land is not fixed until the tract is identified by approval of the plats of survey. Congress knew of this established rule of construction, and had it intended that a different rule should apply to the grant here in question it would presumably have so decreed in unequivocal terms. That the grant was not one of the specific tracts, but of quantity to be filled from certain sections, if undisposed of before survey, and was subject to amendment and change by later legislation, was early held by this Department, and that construction has been adhered to."

No survey is complete until it is done according to the regulations of the Department of the Interior. There is no dispute that that Department has the power to lay down such rules and regulations as it deems necessary for the guidance of subordinates. Until, under the rules of the Department, there was a completed survey of these lands, no title could possibly pass. In *Knight v. United Lands Association*, *supra*, Justice Lamar, delivering the majority opinion of the court, said:

"It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government, and that the action of that department, within the scope of its authority, is unassailable in the courts, except by a direct proceeding."

What constitutes a survey under the rules and decisions of the Department? First, it must be made by

the United States. Second, the survey must be approved by the Commissioner of the General Land Office. Third, the plat of the survey must be filed in the local land office by the Commissioner. If these elements, or any one of them, is lacking, there is no survey within the meaning of the law.

That the United States itself, through properly designated officers, must make the field survey is not questioned. In *U. S. v. Montana Lumbering and Manufacturing Co.* (196 U. S. 573), the court said:

“The right of survey is in the United States.
* * * A contrary conclusion would impair the Government’s right of survey and force it into controversies over surveys made by the railroad or its grantees.”

The Commissioner of the General Land Office and the Secretary of the Interior have the right and power to make rules and regulations and modes of procedure in all matters pertaining to the disposition of public lands. Further, the survey must be approved by the Commissioner of the General Land Office. Clearly, if the right of survey is exclusively that of the United States, the Government has also the right to say how such survey shall be made. The rules and regulations of its proper department to that end, unless clearly and entirely unreasonable, are final. The adoption of, and strict adherence to, fixed rules in a matter of so great importance to the whole people as is this, is absolutely necessary. Without it, the orderly and efficient administration of the land affairs of the Government would

shortly become one of uncertainty and chaos. It was formerly the practice to consider the survey complete upon being approved by the Surveyor General, but because of the confusion of that method, on April 17, 1879, the following order was issued (6 Copp's Land Owner, 136):

**“TIME OF FILING TOWNSHIP PLATS
IN DISTRICT LAND OFFICES.**

The practice of forwarding the triplicate plat to the district land office, before the duplicate plat has been received at the General Land Office, and the approval of same communicated to the Surveyor General ordered discontinued, and hereafter the triplicate plat will be forwarded to the local land office only after notice to the Surveyor General of the approval of the survey. The object of the order is to prevent complications of title, etc., which might arise from entries of lands and subsequent cancellation of survey.”

Since this order, there has been no question but that there can be no final survey until it is accepted by the Department, for as the Supreme Court said in *City of New Orleans v. Paine* (147 U. S. 261, 266), referring to this very point:

“If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hear-

ing. * * * Obviously, the decision of the Surveyor General approving the act of his deputy, was not a finality, since the papers were forwarded by him to the Commissioner of the Land Office, and by him to the Secretary of the Interior for final approval. So long as there was a superior officer, whose approval was contemplated by law or the regulations of the department, no approval by a subordinate officer would operate as a finality."

But not only must the plat be approved by the Commissioner, but it must be filed in the local land office before the survey is completed, or it cannot be recognized as official. In this case, there was no filing of the plat, and hence no survey until November 16, 1907. In rendering a decision on this exact point, in the case of *United States v. Curtner* (38 Fed. Rep. 1, at p. 10), Judge Sawyer (with Justice Field concurring) said:

"Unless the actual survey in the field, and making and approving a plat by the Surveyor General without filing it, or a certified copy of it, in the local land office, places the lands in the category of surveyed lands in contemplation of law, then these lands were also selected before they were surveyed by the United States, and the selections were void. The Interior Department did not regard the survey as official until the certified copy of the official plat was filed by direction of the department in the local land office, June 4, 1869. Whether this is to be regarded as the date of the survey or not, we are satisfied that the lands could not be regarded as legally surveyed in such sense as to open them to selection, location, sale, or other disposition till the approved copy of the plat was filed on December 28, 1865. This is the

earliest date at which they could be considered open to selection, if open to selection then. The land office was the place for the disposition and record of the public lands; and until they had an authentic official plat of the surveys of the public land, it would be impracticable to keep a record of them or of their disposition."

Counsel cites the early California cases of *Oakley v. Stuart*, 52 Cal. 521, 535, and the case of *Medley v. Robertson*, 55 Cal. 396, in support of the theory that the survey became complete at the time it was approved by the Surveyor General, and the last named case is instructive on these points, both on the question of when a survey becomes a survey and as to when the title to the State of sections 16 and 36 attaches. Says the court, in *Medley v. Robertson* (page 398), on the last mentioned proposition:

"It has been more than once held by this court that the State cannot convey title to the sixteenth and thirty-sixth sections until after it receives the title, and that it does not receive the title to any specific land until the plat of the survey has been approved by the United States Surveyor General."

The court thereafter proceeds to overrule the dicta in *Oakley v. Stuart* to the effect that lands have always been treated as surveyed when the lines were run in the field and the monuments or marks established by the proper surveyor, and said:

"It is true that school lands may be said to be surveyed when the lines have been run and the corners established. To hold that such should be deemed

to be a full and completed survey, so as to enable applications for purchase to be made, would practically be to make the acts of the Deputy Surveyor notice to the world, and to compel persons to follow him wherever he went, in order to ascertain what lines had been run and what corners had been established, and would give opportunity for acts of bad faith upon his part in giving private information to his friends, from which they would have an advantage over others. The Surveyor General's office is a public office and his records are public, and to hold that his approval is necessary to complete the survey would place all persons upon an equality and would carry out the principles that where public officers act there should be a record of their acts and a place where the record can be examined by all. *The Surveyor General is the officer charged with the duty of making survey."*

The attention of the Court is, in this connection, particularly invited to the fact that the California case of Oakley v. Stuart was decided in the January, 1878, term of the Supreme Court of that state.

In the Oakley case, the lands in controversy were surveyed in 1854 and the survey approved by the United States Surveyor General in 1861, the approved plat of such survey having been filed in the local office on April 11, 1873. It is thus apparent that the facts out of which this controversy arose antedated by many years the regulation adopted by the Interior Department on April 17, 1879, and hereinbefore mentioned, which took from the Surveyor General and transferred to the Commissioner of the General Land Office and the Secretary

of the Interior the duty of approving plats of government surveys.

Practically the same state of facts existed in the case of *Medley v. Robertson*. In this latter case, the survey of the lands in controversy was made prior to or during the year 1873, and the plat and survey approved by the United States Surveyor General for California in 1874, the plat, in the same year, being filed in the United States Land Office. Conflicting applications to purchase were made after the survey, the one before and the other after the approval of the plat by the Surveyor General, but both applications prior to April 1, 1876. It thus appears that all of the acts out of which this controversy arose occurred several years prior to the Interior Department order of April 17, 1879. As has been heretofore stated, before the date of this order, the United States Surveyor General for each state approved the plats of surveys within his state and placed them, after his approval, in the local land office, without awaiting the approval of the Commissioner of the General Land Office, but since this procedure has been altered by the order and regulation of April 17, 1879, this mode of approval has been entirely changed. It is not believed that a single reported case can be found which deals with questions arising since the promulgation of this order and which supports the contention of defendants, to the effect that a survey may be complete without the approval of the Commissioner of the General Land Office and the Secretary of the Interior. In both the *Oakley* and the *Robertson* cases the Supreme Court of California referred to the regulations of the United States

Land Office in effect prior to the order of April 17, 1879.

Therefore, since the power to impose regulations for the guidance of subordinates rests with the Department of the Interior alone; and since that Department has said through its duly constituted officers that no survey shall be complete until accepted and filed by the Commissioner of the General Land Office, there was no completed survey of these lands until November 16, 1907, and there being no survey of the lands until that time, no title could possibly vest until on or after that date.

PRIOR TO SURVEY TITLE TO SECTIONS 16 AND 36 REMAINS IN THE UNITED STATES, TOGETHER WITH THE RIGHT TO DISPOSE OF SUCH UNSURVEYED LANDS AS MIGHT OR MAY BECOME SECTIONS 16 OR 36 UPON SURVEY.

This proposition appears to be so well settled as to obviate any necessity for lengthy discussion or voluminous citations to cases in which the point is adjudicated. From an early date the courts have taken the position that title under school land grants does not vest in a state until a survey thereof has been completed. The Supreme Court of Utah, in construing the school land grant to that state in the early case of *Ferry v. Street*, *supra*, says:

“Until a survey there could be no townships or sections 16 and 36. If the title and legal right to dispose of the land, found by survey to constitute those sections, continued in the Federal Government until survey, then the patent must be held valid in an

action of ejection. Section 15, above quoted, declares the sections mentioned, 'shall be, and the same are hereby reserved when the lands in said territory shall be surveyed under the direction of the Government.' This language indicates an intention to reserve when the land shall have been surveyed. It does not indicate a grant operating at once and before the survey. * * * No grant *in praesenti* is expressed. The lands are reserved for the purposes mentioned. The right and title remains in the Government. Section 2275 R. S., U. S., shows clearly that the understanding of Congress was that the title should not vest in the territory or state before survey."

The question came before the United States in several cases decided in 1876 and 1877, the first of which was that of *Sherman v. Buick*, 93 U. S. 209, closely followed by *Heydenfeldt v. Daney*, etc., 93 U. S. 634; *Beecher v. Wetherby*, 95 U. S. 517; and *Water & Mining Co. v. Bugby*, 96 U. S. 165.

In the *Heydenfeldt* case, Mr. Justice Davis, at page 640, says:

"Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality."

In the case of *Beecher v. Wetherby*, at pages 524-525, the court say:

"We agree," said the court, "that until the sur-

vey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title. * * * * *

In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section the title of the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State.”

And in the Bugbey case, at page 167, in an opinion by Mr. Chief Justice Waite, it is said:

“In *Sherman v. Buick* (93 U. S. 209), it was decided that the State of California took no title to sections 16 and 36, under the act of 1853, as against an actual settler before the survey, claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. In such a case, the State must look for its indemnity to the provisions of section 7 of the act. As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys; and if the settler failed to assert his claim, or make it good, the rights of the State became absolute. The language of the court is (p. 214): ‘These things (settlement and improvement under

the law) being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and it being shown in the proper mode to the proper officer of the United States, the right of the State to the land was gone, and in lieu of it she had acquired the right to select other land, agreeably to the act of 1826."

And to the same effect is the case of *Minnesota v. Hitchcock*, 185 U. S. 373-393, and the older case of *Gaines v. Nicholson*, 9 Howard 365, in which latter case, at page 364, the court said:

"The State of Mississippi acquired a right to every sixteenth section, by virtue of these acts, on the extinguishment of the Indian right of occupancy, the title to which, in respect to the particular sections, became vested, if vested at all, as soon as the surveys were made and the sections designated."

The Supreme Court of the State of Montana, in the comparatively recent case of *Clemmons v. Gillette* (83 Pac. 879) in discussing the school land grant to that State, at page 880, says:

"For it seems to be the rule, applicable to such grants, that, though they operate for some purposes as grants *in praesenti*, conveying the fee, yet until the official survey is made and the plat has been approved by the federal authorities, the grant is not effective to vest title to any specific portion of the land described by the designation of section numbers only." and, "Even a partial survey of the particular section is not sufficient to identify it. *United States v. Birdseye* (C. C. A.) 137 Fed. 516. The reason of

the rule is that until the subject of the grant is identified there is no particular portion of the great body of lands in which it is included to which the state may assert title or over which it can exercise exclusive right."

And in a more recent case, decided by Judge Dietrich, of the Idaho District Court, on December 5, 1910, entitled *United States v. Bonners Ferry Lumber Co.*, and reported at page 187 of Vol. 184 Fed. Rep., it is said:

"Even if it be assumed that the United States has not the legal right to convey the lands to third persons, or, by including them in reservations, permanently to withhold them from the state, it must be held at least that until the lands are surveyed it retains the legal title, and that the title of the state is therefore not complete. At most the state has but an equiable title, and until an official survey is made exact identification of the grant is impossible."

Counsel for appellants Morrison, in his argument before the trial court, laid much stress upon the case of *Hibbard v. Slack*, reported at page 571 of Vol. 84, Fed. Rep. A well considered opinion by Judge Wellborn of the United States District Court is found in the report of this case. The case, however, is not in support of the contention of appellants, to the effect that the survey is complete when the field work thereof shall have been done. The *Hibbard* case does not in any sense decide this question, but the action is brought to determine the rights of the State to make lieu selections based upon lands included within Forest Reserve when the date of inclusion

thereof is subsequent to the survey of the lands. As the question is put by the court (p. 572) :

“These pleadings raise the following question of law, to wit: Is the State of California entitled to select other lands, in lieu of the sixteenth and thirty-sixth sections of school lands, situated within the exterior boundaries of a public reservation, where said sections were surveyed, and became the property of the state, prior to the date when the reservation was created?”

Nowhere in the opinion of Judge Wellborn is it stated that a survey of government lands is complete when the field work is concluded. The Court, in his opinion, refers to the survey as having been made in the field, but it is not shown that the plats thereof had not been properly and in the usual manner, and in conformity with the Interior Department regulations, formally approved by the proper officials, and a copy of the approved plat filed in the local office before the creation of the reserve in question. The Hibbard case decides nothing, except that advantage may not be taken by the State of California of the lieu selection legislation of Congress to trade for public lands such sections 16 and 36 as may happen to be within the exterior boundaries of a National Forest Reserve, when title to such sections 16 and 36 had vested in the State prior to the creation of such Forest Reserves and the inclusion therein of such state lands. As a matter of fact, it is altogether probable that the survey referred to by Judge Wellborn, as having been made “in the field,” was in all respects in conformity to the regulations of the Interior Depart-

ment, and the plat thereof formally approved by the officers of this department, and a copy thereof filed in the local office long before the creation of the land in question.

It is also of interest to note the position taken by the Department of the Interior in this matter.

If the Forest Reserve be considered a permanent reservation, says the Secretary of the Interior to the Commissioner of the General Land Office, in Black Hills National Forest, 37 L. D. 469-472, the Act of 1891 shows that Congress contemplated that the claims of the States to said sections sixteen and thirty-six might be defeated by reason of other disposition being made of the same, because provision is made for indemnity in the event that said sections are included in any National Reservation or otherwise disposed of, thus showing that the Executive Department, under the authority of Congress, might make some other disposition of the land.

“The grant of sections sixteen and thirty-six, made to the State of Montana by the Act of February 22, 1899, for school purposes, is a grant *in prae-senti*, but the right of the State thereunder does not attach to any particular tract of land until identified by survey; and where prior to such identification any section sixteen or thirty-six is embraced in a National Forest, the right of the State to that specific tract does not attach so long as the reservation continues, but the State is entitled to select indemnity therefor.”

State of Montana, 38 L. D. 247.

And of particular interest in this case is a very late

decision of the Secretary of the Interior, made since the institution of this suit and found at page 259 of Vol. 41 L. D. This decision is entitled State of Oregon, and particularly construes the school land grant to that State and here under consideration. As to the time when title passes from the Government to the State, the Honorable Secretary, at page 260, after referring to the lieu selection rights conferred in connection with the grant to Oregon, says:

“It is clear from this section that title does not pass to the State until survey, nor to reserved lands until the reservation is vacated and the land restored to the public domain. Until such event the right of the State is merely expectant, or inchoate, and though it may stand upon such expectant right and await release of the land from reservation and its restoration to the public domain, it has no title it can convey or right it can assign, and may at any time before vestiture of title relinquish its expectant right by the act of selection of other land as indemnity.”

THE EXECUTIVE WITHDRAWAL FROM ENTRY OR ANY FORM OF DISPOSITION, EXCEPT UNDER THE MINING LAWS OF THE UNITED STATES, MADE BY THE SECRETARY OF THE INTERIOR ON DECEMBER 16, 1905, IS A LEGAL WITHDRAWAL OF THE LANDS HERE INVOLVED AND OPERATED TO PLACE THEM WITHOUT THE OPERATION OF THE GRANT UPON SUBSEQUENT APPROVAL OF THE SURVEY.

The lands involved in this action were withdrawn by the Secretary of the Interior for forestry purposes on December 16, 1905, almost two years before a survey was made and before a title could possibly pass to the State of Oregon. It cannot be questioned that the Secretary of the Interior had the authority to withdraw the land designated. His power to do so has not been doubted, since the United States Supreme Court has in the late cases of *U. S. v. Grimaud*, 220 U. S. 506, and *Light v. United States*, 220 U. S. 523, affirmed that right.

A proclamation setting apart the late Como Forest Reserve was made by the Secretary of the Interior, and it was held in the case of *U. S. v. Blendauer*, 122 Fed. 703, that it was not necessary that the President sign the proclamation. It will be considered as having been done by the Secretary at the direction of the President, and with his approval.

The court's attention is also called to this significant disclosure made by the stipulation of facts and the certified copies of the letters from the Commissioner of the General Land Office in evidence: That from June 8, 1903, until January 31, 1906, the survey was held up purposely by the Commissioner of the General Land Office because on the face of the survey, it was at once shown that the deputy surveyor did not comply with the regulations of the General Land Office; and furthermore, when the survey was approved, which was not until two months after it has been withdrawn for forestry purposes, it was accepted *for payment only*, and the Surveyor-General was ordered to direct the local land of-

fice to permit no entries to be made until the Commissioner gave the permission, and finally approved the survey and ordered the filing of plats in the local office. So that, even had the lands not been withdrawn previously, the State of Oregon had no title to convey on October 10, 1906, since the survey was accepted *for payment only and not for settlement*. But the plaintiff does not admit that there was a survey until the plat was filed on November 16, 1907, thus doing away with any question that Oregon ever had title; but were it to admit, which it does not, that the survey was completed on approval, it would not then have been possible for title to pass until January 31, 1906, while the land had been withdrawn on December 16, 1905.

The defendant contends that the executive proclamation itself excepted from this effect the school lands. School lands are given to the State of Oregon by *grant*, not by a withdrawal or a reservation, and those words are used in the proclamation to refer to withdrawals for Governmental purposes, such as Indian Reservations, Fish Hatcheries, Military Reservations, and the like. A National Forest, to be properly administered, should be in a compact body, and there is no reason why the President should have excepted from the Cascade Range Forest Reserve the unsurveyed sections sixteen and thirty-six, which would thereby entail a divided authority over the lands within the outer boundaries of the forest. As in the case of *Minnesota v. Hitchcock*, the court held that the Governmental necessity for the education of the Indians was superior to the granting to the State for school lands, so in this case the court must surely

reach the conclusion that the Governmental necessity declared by the Executive in the exercise of the powers given him by the Statute (26 Stats. L. 1103) is superior to the claim of the State to this specific section. This particular section is necessary to a proper administration of the National Forests. The State is interested in getting 640 acres of land to sell for the benefit of its school funds. It makes no difference whether those lands be in the Cascade National Forest or any place else in the State of Oregon if the State obtains this right; and the court knows that the income to be derived from the sale by the State of school indemnity scrip is greater than is derived from the sale of a particular piece of school land, because the scrip can be located anywhere. Although the State may, under the Act of February 28, 1891, await the extinguishment of the reservation, yet until that reservation is extinguished it has no established equity in those lands. It has nothing to convey to the defendants in this case. If the Government desires, it might pass a law selling these and other lands to private individuals and using the funds for Forest and other National purposes. The title is in the United States. The land was segregated from the public domain before the State's title attached, and unless it is restored to the public domain the State's title never will attach.

A recent and interesting case upon this phase of the controversy is that of *Alberger v. Kingsbury*, decided in the Supreme Court of California, and reported in 91 Pac. at page 674. This case is one brought to test the validity of a lieu selection, the base of which was an unsurveyed school section sixteen. The township which,

upon survey, would include the base land, had been temporarily withdrawn by order of the Secretary of the Interior, pending an examination to determine the advisability of including the same within a Forest Reservation. Such order of withdrawal was in force at the time the application for the lieu selection was made, and the suit brought, but the unsurveyed base lands had not been, by executive order, thrown into the contemplated Forest Reserve, nor had it been determined that the reserve including these lands should be created. In a well considered opinion by Presiding Judge Cooper, it is held that where lands have been withdrawn by the Interior Department pending further action, with a view to including the same within forest or other reservations, they become a part of a lawful reservation and the title of the State thereto cannot attach. Judge Cooper, at pages 675 and 676, says:

“The words ‘other reservations’ are evidently used in a broad sense in the statute. The word ‘reservation’ is defined in the Standard Dictionary as ‘that which is reserved, kept back, withheld.’ The said sixteenth section, to which the state would be otherwise entitled, has been by the proper authorities of the United States—the Land Department—kept back, withheld, and reserved. It has been reserved with a view to including it in a permanent forest reserve. The state is not now entitled to it, because the United States has seen fit to reserve it for its own uses. It is no answer to this to say that the reservation may not be made permanent, and that the state may yet be entitled to the land. That might be said as to any other kind of reservation—for mili-

fore, the plaintiff respectfully submits that the deed to defendants should be canceled and the title of the Government to the above described lands quieted.

CLARENCE L. REAMES,

United States Attorney,

EVERETT A. JOHNSON,

Assistant United States Attorney,

Attorneys for Respondent.

(In all excerpts of decisions and statutes, the italics are presumably ours.)

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE PENNSYLVANIA CASUALTY COMPANY,
Plaintiff in Error,
vs.

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & COMPANY,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Idaho,
Southern Division.

FILED

OCT 3 - 1913



No. 2297

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Complaint.....	1
Answer to Amended Complaint.....	16
Assignment of Errors....	128
Bill of Exceptions.....	32
Bond on Appeal of Writ of Error.....	135
Certificate of Clerk U. S. District Court to Transcript of Record.....	141
Citation.....	139

EXHIBITS:

Exhibit "A" to Amended Complaint (Insurance Policy No. 27,353, Issued by the Pennsylvania Casualty Company to A. S. Whiteway & Co.).....	5
Plaintiff's Exhibit No. 1 (Policy of Insurance of Pennsylvania Casualty Co., Issued to A. S. Whiteway & Co.).....	143
Plaintiff's Exhibit No. 2 (Check Dated Boise, Idaho, August 13, 1911, from Whiteway-Lee Construction Co. to Bradley Sheppard).....	107
Plaintiff's Exhibit No. 4 (Check Dated Caldwell, Idaho, December 26, 1911,	

	Index.	Page
EXHIBITS—Continued:		
from Whiteway-Lee Construction Co. to Alfred A. Fraser).....		107
Plaintiff's Exhibit No. 5 (Check Dated Boise, Idaho, December 26, 1911, from Alfred A. Frazer to Karl Paine).....		108
Plaintiff's Exhibit No. 6 (Letter Dated Boise, Idaho, June 27, 1911, from Brad- ley Sheppard to A. S. Whiteway & Co.)		108
Plaintiff's Exhibit No. 7 (Letter Dated Boise, Idaho, February 9, 1911, from Jno. A. Coleman to A. S. Whiteway & Co.).. .. .		111
Plaintiff's Exhibit No. 8 (Stipulation)....		119
Defendant's Exhibit No. 1 (Accident Re- port).. .. .		113
Defendant's Exhibit No. 3 (Excerpt from Reporter's Notes in Case of Irvine v. A. S. Whiteway & Co.—Cross-exam- ination of A. S. Whiteway).....		116
Defendant's Exhibit 4 (Policy of Insurance of Pennsylvania Casualty Co., Issued to Fred C. Mock).....		147
Defendant's Exhibit No. 5 (Statement by J. C. Irwin as to Accident).....		117
Judgment.....		30
Motion to Vacate Judgment, etc.....		120
Names and Addresses of Counsel.....		1
Order Allowing Withdrawal of Certain Orig- inal Exhibits.....		134
Order Allowing Writ of Error.....		131

Index.	Page
Order Directing Transmission of Transcript of Record, etc., to Appellate Court.....	140
Order for Filing Bond.....	132
Order Settling and Allowing Bill of Excep- tions.....	126
Petition for Writ of Error.....	127
Stipulation Enlarging Time for Filing Bill of Exceptions.....	31
Stipulation Re Amendment of Complaint, etc...	28
TESTIMONY ON BEHALF OF PLAIN- TIFFS:	
LEE, C. H.....	34
Recalled.....	45
Cross-examination.....	45
Redirect Examination....	52
Recross-examination....	53
Recalled in Rebuttal....	99
Cross-examination.....	103
Redirect Examination....	104
PAINE, KARL.....	42
Cross-examination..	43
SHEPPARD, BRADLEY.....	54
WHITEWAY, A. S.....	57
Cross-examination.....	58
TESTIMONY ON BEHALF OF DEFEND- ANT:	
ALLEN, O. W.....	94
DEAN, D. A.....	97
Cross-examination....	98
FRASER, A. A.....	83

Index.	Page
TESTIMONY ON BEHALF OF DEFEND-	
ANT—Continued:	
HAMMOND, W. L.....	87
IRVIN, J. C.....	72
Cross-examination....	77
Redirect Examination..	77
Recross-examination.....	78
PARADISE, FRANK H.....	91
Cross-examination.....	93
SHEPPARD BRADLEY (Recalled)....	63
Cross-examination....	67
Redirect Examination....	70
WHITEWAY, A. S. (Recalled).....	78
Cross-examination.....	82
Redirect Examination..	82
Waiver of Jury Trial.....	29
Writ of Error.....	137

[Names and Addresses of Counsel.]

MARTIN & CAMERON, Boise, Idaho,
Attorneys for Plaintiff in Error.

ALFRED A. FRASER, Boise, Idaho,
Attorney for the Defendants in Error.

*In the District Court of the Third Judicial District
of the State of Idaho, in and for Ada County.*

Defendant's Exhibit No. 2, Admitted.

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COM-
PANY,
Defendant.

Amended Complaint.

Comes now the plaintiffs, and for cause of action
against the defendant alleges:

1.

That the defendant is a corporation organized and
existing under and by virtue of the laws of the State
of Pennsylvania and during the times hereinafter
mentioned, and now, is engaged in the business of
writing employer's liability insurance.

2.

That the defendant did make, execute and deliver
to the plaintiff its certain policy of indemnity, in-
demnifying the assured against loss by reason of the
liability imposed upon it by law for damages on ac-

2 *The Pennsylvania Casualty Company vs.*

count of bodily injuries, including death, at any time, resulting from such injuries accidentally sustained during the period of the policy, by reason of the business operations described and conducted at the locations named in said policy by all employees of the assured; which said policy was numbered 27,353, and was signed by the president, secretary and general agent of said defendant, and thereby and therein, in consideration of the payment of the premium in the sum of \$90.10, the said defendant did thereby insure said plaintiff for the period of one year from the first day of July, 1910, in the manner and form set forth in said policy [1*] of indemnity, a copy of which said policy is hereto attached, marked Exhibit "A" and made a part of this complaint.

3.

That on the 25th day of July, 1910, and prior thereto, one J. C. Irwin was in the employ of the plaintiff as a steelman, whose entire compensation is included in the estimated compensation as shown in statement three of the declarations of said policy, working for said plaintiff on the construction of a brick building between 10th and 11th Streets on Main Street, Boise, Idaho. That at said time and place, while the said J. C. Irwin was working for the plaintiff as aforesaid, he received bodily injuries, accidentally sustained; and that thereafter, on the 13th day of March, 1911, said J. C. Irwin commenced an action in the District Court of the Third Judicial District of the State of Idaho against the said plain-

*Page-number appearing at foot of page of original certified Record.

tiff to recover the sum of \$15,656.50, as damages for said injury accidentally sustained by said J. C. Irwin on the 25th day of July, 1910, as aforesaid. That thereafter the said plaintiff herein filed their answer to the complaint of said J. C. Irwin, denying all the material allegations of said complaint; that thereafter said action came on for trial in said court and resulted in a verdict in favor of the said J. C. Irwin and against the plaintiff in this action, for the sum of \$7,500 as damages accidentally sustained by said J. C. Irwin while in the employ of this plaintiff as afore stated. The judgment in favor of said J. C. Irwin and against this plaintiff was entered on the 6th day of October, 1911, which said judgment became final on the 6th day of December, 1911.

4.

That on the 26th day of December, 1911, this plaintiff paid in money, in satisfaction of said judgment, the sum of five thousand dollars (\$5,000.00), and that said sum, nor any part thereof, has been paid by said defendant to said plaintiff.

5.

That this plaintiff requested said defendant to defend in the name and on behalf of this plaintiff said action brought by said J. C. [2] Irwin against this plaintiff as aforesaid, and said defendant refused and neglected so to do. That by reason of the failure and neglect of said defendant to defend said action this plaintiff was compelled to hire counsel, and did hire counsel and did defend said action at a cost to said plaintiff for attorney's fees in the sum of five hundred dollars (\$500) and in court costs in

the sum of forty dollars (\$40.00). That the plaintiff has performed and duly complied with all the terms and conditions of said policy upon their part to be kept and performed; that the defendant has failed and neglected to pay said plaintiff said sum of \$5,000.00, paid by the said plaintiff to said J. C. Irwin for the injuries accidentally sustained by him as aforesaid, and has failed and neglected to pay the plaintiff the sum of five hundred dollars (\$500.00) as its attorney fee in defending said action, or the sum of forty dollars (\$40) as court costs in said action, or any part of the same, and there is now wholly due, owing and unpaid from the defendant to the plaintiff the sum of five thousand five hundred forty dollars (\$5,540.00).

WHEREFORE, plaintiff prays judgment against the defendant for the sum of five thousand five hundred forty dollars (\$5,540.00) and for costs of this action.

ALFRED A. FRASER,

Attorney for Plaintiff, Residing at Boise, Idaho.

State of Idaho,

County of Ada,—ss.

C. H. Lee, being first duly sworn, deposes and says that he is one of the members of the copartnership of A. S. Whiteway & Co.; that he has read the foregoing complaint and knows the contents thereof, and that he believes the facts therein stated to be true.

C. H. LEE.

Subscribed and sworn to before me this 5th day of January, 1912.

[Notarial Seal]

D. T. MILLER,

Notary Public. [3]

Exhibit "A" [to Amended Complaint].

No. 27,353.

THE PENNSYLVANIA CASUALTY COMPANY, of Scranton, Pennsylvania, (hereinafter called the company) does hereby agree with A. S. Whiteway & Company (hereinafter called the assured);

IN CONSIDERATION of the payment of the premium as hereinafter provided and the Declarations on page three of this policy:

1. To Indemnify the Assured, subject to the limits expressed in Statement Four of the Declaration against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries, including death at any time resulting from such injuries accidentally sustained during the period of this Policy by reason of the business operations described and conducted at the locations named in said Declaration by all employees of the Assured as hereinafter provided.

2. To defend in the name and on behalf of the Assured any suits, even if groundless, which may at any time be brought on account of such injuries and to pay all costs taxed against the Assured under any legal proceedings defended by the Company, all expenses incurred in the investigation of such injuries and in the negotiations for settlement, all expenses of the contest of claims arising therefrom, and all

interest on such part of any judgment as shall not be in excess of the limits of the Company's liability as hereinafter expressed.

3. To reimburse the Assured for all expenses incurred by him for such immediate surgical relief as shall be imperative at the time any such injury is sustained.

4. This policy shall cover as above provided: (1) All such injuries sustained at the locations described in the Declarations by all employees of the Assured whose entire compensation is included in the estimated compensation as shown in Statement Three of the Declarations, including also drivers employed by the Assured who are specifically enumerated in any concurrent Teams policy carried by the Assured in this Company while such drivers are engaged in any duties other than those of a driver. (2). [4] All such injuries sustained by such employees caused by any person wholly engaged in clerical or office duties, the Assured himself if the Assured is an individual, any member of the firm if the Assured be a firm, the President, Vice-President, Secretary and Treasurer if the Assured be a corporation, but injuries to the person described in this clause shall not be covered unless the compensation paid to such persons is included in the estimated compensation. (3). All such injuries sustained by drivers, and their helpers, lumpers, stevedores, loaders, material handlers, time-keepers, pay-clerks and messengers whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the

service of the assured in connection with the business operations described in the Declarations. This policy shall not cover the injuries sustained by any person or persons except as above provided not any injuries occasioned by reason of the failure of the Assured to observe any statute effecting the safety of persons, nor any injuries occasioned by reason of the failure of the Assured to observe any local ordinance of which he has knowledge nor any injuries sustained or caused by any person employed by the Assured in violation of law as to age or under the age of fourteen years if there is no legal age limit, or by any contract convict laborer, nor liability of others assumed by the Assured under any contract or agreement, oral or written.

THESE AGREEMENTS ARE SUBJECT TO THE FOLLOWING CONDITIONS:

A. The premium is based upon the entire compensation earned during the policy period by all employees of the Assured, not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this Policy. The premium is subject to adjustment at the termination of the policy or at the end of each period of one year if the policy be written for a longer term, when the Assured shall furnish to the Company for the purpose of said adjustment a written Declaration of the exact amount of compensation [5] earned by the said employees during the said period. If the earned premium computed thereon at the rate or rates specified in Statement Three exceeds the estimated premium paid, or such portion of it as

represents the premium for the annual period, the Assured shall immediately pay the additional amount to the company; if less, the Company shall return to the Assured the unearned premium, but except in the event of cancellation by the Company or by the Assured when the Assured is retiring from business, the Company shall receive or retain the minimum premium provided in Statement Twelve. The word "Compensation" used in this paragraph shall include all salaries, wages and other sums paid for regular time, overtime, piece work or for allowances and also the cash equivalent of all board, merchandise, store certificate, credits or any other substitute for cash.

B. This policy may be cancelled by the Company at any time by written notice served on or sent by registered letter to the Assured at the address given herein, stating when the cancellation shall be effective. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata when determined. If cancelled by the Assured unless the Assured has retired from business, the Company shall receive or retain the customary short-rate premium. (In either case the earned premium shall be computed on the compensation for the year as indicated by the actual compensation earned by the employees of the Assured during the time the policy shall have been in force.) In any case, the Company shall receive or retain the minimum earned premium stated in Statement Twelve. The Company's check mailed to the ad-

dress of the Assured as given herein shall be a sufficient tender, but no return premium shall be payable until a statement of actual compensation earned by the employees of the Assured during the period the policy was in force shall have been furnished to the Company by the Assured. [6]

C. The Company shall be permitted at all reasonable times during the policy period to inspect the plant, works, machinery and appliances covered by this policy and to examine the Assured's books at any time during the policy period or any extension thereof, or within one year after its final expiration so far as they relate to the compensation earned by his employees while this policy was *ub* force.

D. Upon the occurrence of an accident, the Assured shall give immediate written notice thereof to the Company, or its duly authorized agent, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If thereafter any suit is brought against the Assured, he shall immediately forward the Company every summons or other process served upon him. The Assured when requested by the Company shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals, and shall at all times render to the Company all co-operation and assistance in his power. He shall not voluntarily assume any liability, except as provided in Paragraph Three of the insuring clause, settle any claims or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceeding with-

out the consent of the Company previously given in writing.

E. No action shall lie against the Company to recover for any loss under Paragraph One of this Policy unless it shall be brought by the Assured for loss actually sustained and paid by him in money in satisfaction of a judgment after a trial of the issue and no such action shall lie to recover under any other agreement unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety (90) days after the right of action accrues as herein provided.

F. Any limitations or requirement of this Policy as respects time for notice of accident or for any legal proceeding conflicting with the law of the State in which the policy is issued shall be construed as amended to conform with such law. [7]

G. No assignment of interest under this Policy shall bind the Company unless the consent of the Company shall be endorsed hereon.

H. If the Assured shall carry a policy of another insurer, whether valid or not, against a loss covered by this policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of his insurance.

I. In the case of payment of loss under this Policy, the Company shall be subrogated to all rights of the Assured against any person or corporation, as respects such loss, to the amount of such payment, and the Assured shall execute all papers required

and shall co-operate with the Company to secure to the Company such rights.

J. No condition or provision of this Policy shall be waived or altered except by endorsement attached hereto signed by the President, Vice-President, Secretary or Assistant Secretary of the Company; nor shall any notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. The personal pronoun herein used to refer to the Assured shall apply regardless of number or gender.

K. Statements of the Declarations on page three of this Policy, numbers One to Twelve inclusive, are warranted by the Assured to be true and correct except such as are declared to be matters of estimate only. This Policy is issued in consideration of and upon the faith of such warranties. The provisions of the policy respecting its premium and the payment of the premium as expressed in the Declarations.

IN WITNESS WHEREOF, The Pennsylvania Casualty Company of Scranton, Pa., has caused this policy to be signed by its President and Secretary at Scranton Pa., and countersigned by a duly authorized agent of the Company.

THOMAS E. JONES,
President.

F. H. KINGSBURY,
Secretary.

12 *The Pennsylvania Casualty Company vs.*

Countersigned at Seattle, Washington, the 1st day of July, 1910.

HANFORD & DE VEUVE,
General Agents.

BRADLEY SHEPPARD,
Agent, Boise, Idaho. [8]

DECLARATIONS.

Statement 1.

Name of Assured, A. S. Whiteway & Company.
Address, Boise, Idaho.

Individual, co-partnership, corporation or estate,
Co-partnership.

Statement 2.

The Policy Period shall be from June 27th, 1910, to June 27th, 1911, at 12 o'clock noon. Standard Time, at Assured's Address as to each of said dates.

Statement 3.

A full description of the operations covered by this policy, the locations of all places where such operations are conducted, the estimated average number of employees engaged therein, the estimated compensation of such employees for the term of this policy, the premium rate or rates, and the estimated premium, are given hereunder:

Location of all places where business Operations are to be conducted:	Description of business Operations to be Insured:
Between 10th & 11th Sts., on Main St., Boise, Idaho, Lot 4, Blk. 16,	Constructing four story brick building; Masons, Bricklayers, Carpenters, Plasterers, Painters, Steelmen, Electric wiring, Sheet-metal workers.

Estimated Average No. of Employees.	Estimated total of Annual Wages and Other Compensation.	Rate per \$100 of wages.	Estimated Premium.
Masons, Bricklayers 10/20	1000.00	2.25	22.50
Carpenters 10/20	2000.00	2.25	45.00
Plasterers 5/10	800.00	1.20	9.60
Painters 5.10	250.00	1.20	3.00
Steelmen 5/10	50.00	6.50	3.25
Electric Wiring 3/5	250.00	1.50	3.75
Sheet Metal Workers 2/5	100.00	3.00	3.00

Total Estimated Premium: Ninety and 10/100 Dollars.....\$90.10

Statement 4.

The Company's limit of liability, whether only one or more than one interest is covered by this policy, exclusive of expenses referred to in paragraphs Two and Three of the insuring clause of the policy, for death or injury to one person shall be Five Thousand and no/100ths Dollars (\$5000.00) and subject to the same limit for each person, the Company's total liability (exclusive of said expense) on account of any one accident causing death or injury to more than one person, shall be limited to Ten Thousand and no/100ths Dollars (\$10,000.00).

Statement 5.

The foregoing enumeration of employees includes all persons in the service of the Assured in connection with the operations described herein at the places of such operations and elsewhere to whom compensation of any nature is paid or allowed, ex-

14 *The Pennsylvania Casualty Company vs.*

cept the members of the Assured if a co-partnership, the President, Vice-President, Secretary or Treasurer if a Corporation, any drivers employed by the Assured who [9] are covered in any concurrent Teams Policy carried in this Company, or persons wholly engaged in clerical or office duties. The foregoing estimated compensation is offered for the purpose of computing the estimated premium and shall include the entire compensation (by which is meant all salaries, wages, or other sums paid for regular time, over-time, piece work or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash) earned by all employees in the service of the Assured engaged in connection with the operations hereinbefore described.

Statement 6.

No further exclusions shall be made from the payroll except as herein stated No exceptions.

Statement 7.

None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations and their estimated compensation and the premium rate are specifically stated herein.

Statement 8.

No explosives are made, sold, kept or used in the business described herein, except as herein stated. No exceptions.

Statement 9.

No operations of any nature not herein disclosed

are conducted by the Assured at the places covered hereby except as herein stated. No exceptions.

Statement 10.

The estimate of wages or other compensation does not include wages paid by independent subcontractors, except as herein stated. No exceptions.

Statement 11.

No similar insurance has been declined or canceled by any company during the three years last past, except as herein stated. No exceptions.

Statement 12.

The minimum premium for this policy shall be Fifty and no/100ths dollars (\$50.00).

[Endorsed]: Filed Feb. 23, 1912. A. L. Richardson, Clerk. [10]

*In the District Court of the United States, in and for
the Judicial District of the State of Idaho,
Southern Division.*

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY and COMPANY,
Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Answer to Amended Complaint.

Comes now the defendant and answers the complaint as amended:

1.

Denies that defendant did make, execute and deliver, or make or execute, or deliver to the plaintiff its certain or any policy of indemnity, indemnifying the assured against loss by reason of the liability, imposed upon it by law or otherwise or at all, on account of bodily injuries, including death, or for any other reason or at all, at any time, resulting from such injuries, accidentally, or otherwise sustained during the period of the, or any, policy or any time or at all, by reason of the business operations described and conducted at the locations named in said policy, or any other place, or at all, by any or all employees of the assured, or for any other reason or at all, except and only as stated in the written agreement entered into between plaintiff and defendant referred to in plaintiff's complaint as Exhibit "A," and a true copy of which said agreement is hereto attached, made a part of this answer and referred to as Exhibit "1" and not otherwise. [11]

Denies that thereby and therein, or thereby or therein, in consideration of the payment of the premium in the sum of ninety and ten hundredths (\$90.10) dollars, or for any consideration of the payment of the premium, or any premium in the sum of ninety and ten hundredths (\$90.10) dollars, or any other consideration, payment, premium, sum or

amount whatsoever, the defendant did insure said plaintiff for the period of one year, or for any other term or period whatsoever except as set forth in Defendant's Exhibit "1" hereunto attached and made a part hereof as above said.

3.

Denies that on the 25th day of July, 1910, and prior thereto, or at any time or at all J. C. Irwin was in the employ of the plaintiff as a steelman, at any place, and denies that on said date, and prior thereto, or prior thereto, or at any time or at all, J. C. Irwin was in the employ of the plaintiff as a steelman, whose entire compensation is included in the estimated compensation as shown in statement three of the Declaration of said policy, to wit, the contract referred to as Exhibit "A" of plaintiff's amended complaint and Exhibit 1 of defendant's answer to said amended complaint. Denies that at said time and place, or at any time or place, said J. C. Irwin received bodily injuries while working as a steelman, or as a steelman whose entire compensation is included in the estimated compensation as shown in statement three of the declarations of said policy, but admits that said J. C. Irwin received bodily injuries. Denies that said agreement was numbered and signed or numbered or signed in any manner whatsoever except as shown in Exhibit "1" hereunto attached.

4.

That as to the allegation—

"That on the 26th day of December, 1911, this plaintiff paid in money in satisfaction of such judgment, the sum of five thousand [12]

(\$5,000) Dollars, and that said sum nor any part thereof has been paid by said defendant to said plaintiff.”

the defendant has no information or belief upon the subject sufficient to enable it to answer said allegation and placing its denial upon that ground, denies that on the 26th day of December, 1911, or at any other time, or at all, plaintiff paid in money or in any other manner whatsoever in satisfaction of said judgment, or any judgment the sum of five thousand (\$5,000.00) dollars, or any other sum or amount whatsoever.

5.

Denies that by reason of the failure and neglect, or the failure or neglect of said defendant to defend said action, the plaintiff was compelled to hire counsel, and did hire counsel, or did hire counsel and defend or defend said action at a cost to said plaintiff for attorney's fees in the sum of \$500 or in any other sum or amount, and in court costs, or in court costs in the sum of \$40, or in any other sum or amount whatsoever.

6.

Denies that plaintiff has performed and duly complied with or duly complied with, or complied with all or any of the terms and conditions of said policy or agreement, Exhibit 1, upon plaintiff's part to be kept and performed.

7.

Denies that there is now due and owing or due or owing from defendant to plaintiff the sum of \$5,540, or any other sum or amount whatsoever.

Further answering plaintiff's amended complaint, and for a first defense, defendant alleges:

That at all times during the life of said contract, Exhibit 1, referred to above, and such references made a part of this defense, [13] and up to the time the complaint was filed herein, the defendant has performed and complied with in a due, good and substantial manner all of the terms and conditions of its said contract, Exhibit 1, with plaintiff upon the part of defendant to be kept and performed.

Further answering plaintiff's amended complaint and for a second defense, defendant alleges:

That prior to the 27th day of June, 1910, the plaintiff was a general contractor constructing works, structures and buildings by the labor of men and employees hired and engaged by plaintiff to do work in their respective lines or trades upon the works, structures and buildings to be built by the plaintiff; that in such work the plaintiff was accustomed to hire and did hire and employ common laborers, drivers, carpenters, plasterers, painters, electrical workers, bookkeeper, timekeepers, engineers, material handlers, steelmen, sheet-metal workers, lawyers, doctors and many other employees of divers trades and professions; that on or about the 27th day of June, 1910, the plaintiff had commenced or was about to commence the construction of the building known as the Tiner Building, now known as the Boz Theatre Building, at the location on Main Street in Boise, Idaho, set forth in the Exhibit 1, referred to in this answer; that in the construction of that particular building the plaintiff had hired and engaged or was

contemplating the hiring and engaging or did afterwards hire and engage common laborers, drivers, carpenters, plasterers, painters, electrical wirers, bookkeepers, timekeepers, engineers, material handlers steelmen, sheet-metal workers, lawyers, doctors, and other employees of divers trades and professions; that on or about the 27th day of June, 1910, plaintiff asked defendant for indemnity insurance on certain classes of laborers in and about the construction of the said building, and inquired from defendant what the rate would be on each class which plaintiff desired to insure and desired to be covered by said contract of indemnity; that plaintiff was given by [14] defendant rates for 10 to 20 masons and bricklayers, such rate on masons and bricklayers being \$2.25 per \$100 of wages; that the estimated amount to be paid such masons and bricklayers was \$1,000; for 10 to 20 carpenters, such rate on carpenters being \$2.25 per \$100 of wages; the estimated amount to be paid such carpenters was \$2,000; for 5 to 10 plasterers, such rate on plasterers being \$1.20 per \$100 of wages, and the estimated amount of compensation to be paid such plasterers was \$800; for 5 to 10 painters, such rate on painters being \$1.20 per \$100 of wages, and the estimated amount of compensation to be paid such painters was \$250.00; for 5 to 10 steelmen, such rate on steelmen being \$6.50 per \$100 of wages, and the estimated amount of compensation to be paid such steelmen was \$50.00; for 3 to 5 electric wirers, such rate of electric wirers being \$1.50 per \$100.00 of wages, and the estimated amount of compensation to be paid

such electric wirers was \$250.00; for 2 to 5 sheet-metal workers, such rate on sheet-metal workers being \$3.00 per \$100 of wages, and the estimated amount of compensation to be paid such sheet-metal workers was \$100; and after receiving such rates from the defendant, on or about the date above said, plaintiff contracted with defendant for the insurance of plaintiff against loss by reason of the liability imposed upon plaintiff by law for damages on account of bodily injuries, including death, at any time resulting from such injuries accidentally sustained during the period, June 27th, 1910, to June 27th, 1911; by reason of the business operations described and conducted at the place designated in the said Exhibit 1; by the masons, bricklayers, carpenters, plasterers, painters, steelmen, electric wirers, and sheet-metal workers employed by the plaintiff, whose entire compensation was included in the estimated compensation shown in Statement three of the Declarations of Exhibit 1, the contract between plaintiff and defendant; that defendant had rates and insured other classes of [15] laborers if such insurance was asked for, but plaintiff did not ask for rates on common laborers and did not contract for the insurance of its common laborers or any other classes of workmen except those expressly mentioned in the said contract Exhibit 1, between plaintiff and defendant; that said J. C. Irwin, at all times he was in the employ of the plaintiff, was a common laborer, and was not covered by said contract between plaintiff and defendant; that all agreements above referred to in this contract as having

been entered into by plaintiff and defendant are the agreements set forth in Exhibit 1, and not otherwise.

B.

That on or about the 27th day of June, 1910, defendant agreed with plaintiff to defend in the name and on behalf of the plaintiff any suits, even if groundless, which might at any time be brought on account of injuries to the employees covered and included in said contract, Exhibit 1, to wit, said masons, bricklayers, carpenters, plasterers, painters, steelmen, electric wirers and sheet-metal workers; and no others, and that said J. C. Irwin was not one of the classes of workmen included as above said, but was a common laborer, and that defendant owed plaintiff no duty to defend said suit brought by the said J. C. Irwin against plaintiff, nor to pay the costs of said suit or to pay the attorney's fees which plaintiff alleges was contracted to be paid in said suit on its behalf.

That the defendant had a rate for the insuring of common laborers on such work as the plaintiff was contracting to do, but that plaintiff failed and neglected to insure its common laborers, and did not pay any rate of insurance upon its common laborers, and failed and neglected to contract with defendant for such insurance upon its common laborers, and that by reason of such failure and neglect to insure its common laborers and not by reason of any act or omission of or on the part of the defendant, the plaintiff itself assumed the [16] liability for the injury to any of its common laborers on account of

plaintiff's negligence.

FOR A FURTHER AND THIRD DEFENSE, defendant alleges:

1.

That on or about the 27th day of June, 1910, plaintiff agreed with the defendant, in consideration of the premises of the defendant set forth in said contract, that plaintiff would give notice with full particulars of any claim made on account of accident to any of plaintiff's employees insured, and plaintiff further agreed that if any suit was brought after the occurrence of an accident to any of plaintiff's employees insured by said contract, that plaintiff would immediately forward to the defendant every summons or other process served upon plaintiff; plaintiff further agreed that plaintiff would not interfere in any negotiations for settlement or legal proceedings without the consent of the defendant previously given in writing; that plaintiff failed to perform each and every of such agreements in this, that on the 17th day of December, 1910, without the consent or even the knowledge of defendant, the plaintiff waived the notice of injury and intention to sue required by the statute of Idaho, both as to time and sufficiency thereof and also as to the sufficiency of the service thereof, in the words following, to wit: "Service of the foregoing notice by copy is hereby accepted, this 17th day of December, 1910, by the undersigned, who was on July 25th, 1910, and now is a member of the firm of Whiteway and Company, and I hereby waive for the firm any objection to the sufficiency of said notice, having been present

in person at the time of the injury referred to in said notice and to the sufficiency of the service thereof," thus aiding the said J. C. Irwin in overcoming the statutory requirement necessary to be met before he could bring suit upon the statutory liability provided in the Laws of 1909, Session Laws of Idaho, at page 34, and the act following that page; that plaintiff further interfered with [17] settlement and broke the said agreement in this, that on or about the 1st day of September, 1910, plaintiff told an attorney to go and see said J. C. Irwin concerning bringing suit against the defendant, and plaintiff turned over papers and documents to said attorney to aid said attorney in commencing and prosecuting said suit to be brought by the said J. C. Irwin.

FOR A FURTHER AND FOURTH DEFENSE, defendant alleges:

1.

That on or about the 26th day of July, 1910, plaintiff represented to this defendant that the said J. C. Irwin was a common laborer and working as such for plaintiff at the time of his injury; that at many times and on all occasions when the matter came up the plaintiff always represented to the defendant and others that the said J. C. Irwin was a common laborer and so stated; that defendant relied upon such statements and representations by the plaintiff to the effect that said J. C. Irwin was a common laborer; that defendant believed such statements and representations and now believes them that said J. C. Irwin was a common laborer at the time said Irwin

was in the employ of the plaintiff; that the fact that said Irwin was not a common laborer was not known to the defendant and is not now so known; that if said statements and representations so made as above said by the plaintiff to the effect that said Irwin was a common laborer were not true, then such statements and representations were certainly made with gross negligence on the part of plaintiff; that said statements and representations were made in great part by the plaintiff to the defendant before the plaintiff requested or intimated that plaintiff wanted defendant to defend the said suit brought by the said Irwin against the plaintiff; that relying upon said statements and representations by the plaintiff, that said J. C. Irwin was a common laborer at the time of his employment with plaintiff, and believing said statements and representations [18] to be true, the defendant refused to defend said suit brought by the said J. C. Irwin against the plaintiff herein, and that plaintiff herein has at all times since the commencement of said suit and during the progress of said suit, stated, represented, and acquiesced in the statements, and representations that said Irwin was a common laborer in and during the time he was employed by the plaintiff that relying upon, believing in, because of and on account of such statements and representations of plaintiff the defendants were caused an irretrievable loss, if plaintiff be permitted to prove the fact to be otherwise that plaintiff has stated and represented, to wit, the defendant has lost the right to its day in court to defend said suit brought by said Irwin against the plaintiff; that the

said judgment in the said Irwin case against the plaintiff is final and that defendant could in no way obtain that which is secured to it by its rights under the said contract; that the plaintiff has never intimidated by word, act or deed otherwise than that said J. C. Irwin was a common laborer until plaintiff's attorney asked leave to stipulate in this court on the 24th day of September, 1912, that plaintiff be allowed to amend its complaint so that said amended complaint should contain the allegation that said J. C. Irwin was a steelman during his employment with the plaintiff instead of a common laborer as had always theretofore been represented, stated, believed and pleaded; that by reason of the said representations made by the plaintiff as above said, and by reason of the reliance placed thereon and the belief given thereto by defendant, and by reason of the fact that defendant has believed, relied and acted upon said representations and statements to its damage and loss as above said, the plaintiff herein is estopped to prove that said Irwin is other than or was other than a common laborer at the time of his employment with plaintiff and that said plaintiff is estopped to deny that said J. C. Irwin was a common laborer at said time. [19]

WHEREFORE, defendant prays that plaintiff take nothing in this cause and that defendant be hence dismissed with its costs and disbursements in this action.

MARTIN & CAMERON,
Attorneys for the Defendant, Residence and Post-
office Address of Defendant's Attorneys, Boise,
Idaho.

State of Idaho,
County of Ada,—ss.

Bradley Sheppard, being first duly sworn, deposes and says that he is the resident agent of the defendant herein; that he as such is authorized by the said defendant to make this verification; that he has read the foregoing answer and knows the contents thereof and that the same is true as he verily believes; that the reason this verification is not made by some officer of the defendant is that said officers reside outside of Ada County, State of Idaho.

BRADLEY SHEPPARD.

Subscribed and sworn to before me this 4th day of October, 1912.

[Notarial Seal]

P. MARTIN,
Notary Public.

Copy of the foregoing answer served on me this 4th day of October, 1912, at Boise, Idaho.

ALFRED A. FRASER,
Attorney for the Plaintiff.

(Exhibit No. 1 omitted, being the same as Exhibit "A" attached to the Amended Complaint.)

[Endorsed]: Filed October 4, 1912. A. L. Richardson, Clerk. [20]

*In the District Court of the United States, Southern
Division, District of Idaho.*

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COM-
PANY,

Defendant.

Stipulation [Re Amendment of Complaint, etc.].

IT IS HEREBY STIPULATED AND
AGREED by and between counsel for the respective
parties herein that the plaintiff may amend the com-
plaint on file herein by striking therefrom the words
“common laborer” and inserting by interlineation
in place therefor the words “steelman whose entire
compensation is included in the estimated compensa-
tion as shown in Statement Three of the Declara-
tions of said policy,” and waiving the reverification
of said complaint. And that the defendant may
have ten days from and after this date within which
time to answer said complaint as amended, and that
the trial of this action shall not be had prior to the
17th day of October, 1912.

Dated this 24th day of September, 1912.

ALFRED A. FRASER,

Attorney for Plaintiff,

MARTIN & CAMERON,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 17, 1913. A. L. Richardson, Clerk. [21]

*In the District Court of the United States, District
of Idaho.*

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & COMPANY,
Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COM-
PANY,
Defendant.

Waiver of Jury Trial.

It is hereby stipulated by and between the respective parties to the above-entitled action, acting through their attorneys of record hereunto subscribed, that a jury trial of the issues of fact in the above-entitled cause is hereby waived by each of the parties to this cause.

Dated this 15th day of February, 1913.

ALFRED A. FRASER,
Attorney for Plaintiff,
MARTIN & CAMERON,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 20, 1913. A. L. Richardson, Clerk. [22]

*In the District Court of the United States, Southern
Division, District of Idaho.*

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COM-
PANY,

Defendant.

Judgment.

THIS CAUSE coming regularly on for trial before the Court, a jury having been duly waived in writing by counsel for the respective parties herein, Alfred A. Fraser appearing as attorney for the plaintiff, and Messrs. Martin & Cameron appearing as counsel for the defendant; and the Court having heard the evidence and the testimony of the witnesses and argument of counsel thereon, and after duly considering the same and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered herein against the said defendant, the Pennsylvania Casualty Company, and in favor of the plaintiff;

WHEREFORE, by reason of the law and the premises aforesaid, it is Ordered, Adjudged and Decreed that A. S. Whiteway and C. H. Lee, copartners as A. S. Whiteway & Company, plaintiff, do have and recover of and from the said defendant, The Pennsylvania Casualty Company, the sum of

\$5,570, with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until [23] paid, together with said plaintiffs' costs and disbursements incurred in said action amounting to the sum of \$31.20.

Dated this 19th day of February, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed February 19, 1913. A. L. Richardson, Clerk. [24]

*In the District Court of the United States, District
of Idaho, Southern Division.*

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & CO.,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COM-
PANY,
Defendant.

**Stipulation Enlarging Time for Filing Bill of
Exceptions.**

It is hereby stipulated by and between the attorneys for the respective parties that the defendant having shown cause therefor, the time for the signing, allowance and filing of the bill of exceptions of the above-named defendant is extended for the period of forty days from and after the date of this stipulation, to wit: February 25th, 1913, which date is within the ten days after the notice of written de-

(Testimony of C. H. Lee.)

A true copy of the same being attached to and made a part of the complaint.

[Testimony of C. H. Lee, for Plaintiffs.]

C. H. LEE, a witness duly called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. FRASER.)

Q. Where do you reside, Mr. Lee?

A. In Boise.

Q. You are one of the members of the firm of A. S. Whiteway & Company? A. Yes, sir.

The COURT.—Just a moment. I don't see the amended complaint here. It is being tried on an amended complaint, isn't it?

Mr. FRASER.—The amendment was by interlineation.

The COURT.—It is in this transcript?

Mr. FRASER.—Yes.

Mr. MARTIN.—There is a stipulation there that sets the interlineation out.

Mr. FRASER.—The interlineation has been put in, Mr. Martin.

Q. Calling your attention to Plaintiff's Exhibit No. 1, I ask you if that is the policy which you received from the Pennsylvania Casualty Company, as a member of the firm of A. S. Whiteway & Company? A. Yes, sir, that is the policy.

Q. This policy recites that the estimated premium was \$90.10. Was that premium paid to the company?

(Testimony of C. H. Lee.)

A. Yes, sir; that was paid to the company. [28]

Q. That was paid to the company? A. Yes, sir.

Q. Were you acquainted with one J. C. Irwin?

A. No, I don't know that I have ever seen the gentleman.

Q. The gentleman that was injured, did you ever see him?

A. I saw him only once, I think,—during the trial.

Q. You didn't see him before that?

A. No, I didn't see him.

Q. Was any payment outside of that estimated premium ever made by you to the company on that policy? A. Yes, sir.

Q. Calling your attention to Plaintiff's Exhibit No. 2 for identification, just state what that was.

A. This was a check paid by Whiteway & Lee to Bradley Sheppard, the agent for the Casualty Company, as a balance due on these premiums.

Mr. FRASER.—Is there any objection to the check, showing payment?

Mr. MARTIN.—Are you offering it?

Mr. FRASER.—Yes.

Mr. MARTIN.—No objection.

(Said check, marked Plaintiff's Exhibit No. 2, was thereupon marked "Admitted.")

Q. What was that payment made for?

A. That was made for the payment that we owed them on the policy, the amount of premium due on the policy. We paid a certain amount there, the estimated cost, when the policy was issued; then, after the expiration of the policy, a settlement was made

(Testimony of C. H. Lee.)

on the balance due. These payments were made on the basis of the payroll, under certain classifications.

Q. Were your books and payrolls checked up by the company, [29] or any agent of the company, to find out the amount of premium which was due to the company under that policy?

A. Yes, sir; our payroll was checked up by an auditor that came here representing the company, after these payments had been made.

Q. These payments you made, \$90.10, and this further payment of \$34.80, what employees' compensation was included in those payments?

Mr. MARTIN.—We object to that, as the contract itself sets forth the classification of employees that were covered by this policy, and the payments that should have been made under the policy, and they haven't pleaded that we are estopped from denying any liability by reason of their having paid for some one that was not covered by the policy.

Mr. FRASER.—Calling the Court's attention to the provisions of the policy, and then to a decision of the Federal Court, the policy provides, etc. (Reading from policy, and later reading from case in 100 Fed. Rep., 604, at page 606.)

The COURT.—Gentlemen, this is not being tried before a jury. I think I shall be liberal in permitting the introduction of evidence, and, without ruling definitely upon the point which you have raised, I think I shall permit him to answer this question. The point isn't entirely clear in my mind.

(Testimony of C. H. Lee.)

Mr. MARTIN.—I would like an exception at this time, your Honor.

The COURT.—Yes. You may answer the question, Mr. Lee.

A. The premiums was paid upon the entire payroll, [30] everybody enumerated in the different schedules. And I would like to state here that when these schedules were prepared they were prepared by the company, and not by Whiteway & Lee. Mr. Sheppard, the agent of the company, when he came soliciting the work, he made these schedules, and I asked him,—I said: “Now, Mr. Sheppard, you state brick masons as a schedule. What does that include? Does that include simply the brickmen who are laying bricks, or does it include everybody connected with that branch of the work,—the hod-carriers, the mortar-mixers, and the scaffold handlers?” And he said, “Yes, it includes everybody.”

Mr. MARTIN.—We would like to have an exception to the testimony of the witness, on the ground that it might tend to vary the written contract. They are suing here on this contract.

Mr. FRASER.—That testimony which the witness has just given is exactly in line with the evidence admitted in the Circuit Court of Appeals case.

The COURT.—I haven't any doubt that the testimony is admissible. Of course it isn't in response to the question. It is competent to show what was said and done at the time, as tending to illuminate the meaning of the phraseology of the contract, as to what is meant by the term “masons” and “bricklayers,”

(Testimony of C. H. Lee.)

for instance. If you insist upon objection on the ground that it is not responsive to the question, I will sustain it.

Mr. MARTIN.—I don't desire to object to it on that ground.

The COURT.—On the other ground the objection will be overruled. I may say that you have exceptions [31] to all adverse rulings of the Court.

Mr. FRASER.—Q. What else was said at that time in regard to these schedules, between yourself and Mr. Bradley Sheppard, if anything?

A. We took up every schedule in succession, in the order in which they are in the policy, and I asked that same question, "Does this policy cover all of the persons employed under these schedules, everybody?" I detailed them just as they come along and he said, "Yes" to each one of them. And the steel was last, and I said, "How about the steel people? We have employed no expert steelmen on a job like this, and does the policy cover everybody working on the steel?" And he says, "Yes, most assuredly, it covers everybody, and you pay a premium on all the wage-earners, no matter what they are working at, in the class under which they are." And he instructed me to keep my payroll separately, so that premiums could be estimated on the classifications. I did so, and he was paid on that basis, and subsequently, as I said before, the auditor came around, and he checked them up along those same lines, including every dollar paid on the payroll, of employees on that building; every dollar paid out, after the policy was issued,

(Testimony of C. H. Lee.)

until the building was completed, was paid for under those schedule rates.

Q. Mr. Lee, was Irwin put in your payroll then under the schedule of "Steelmen"? A. Yes, sir.

Mr. MARTIN.—We move to strike that, on the ground that it is not the best evidence.

The COURT.—Denied.

Mr. FRASER.—Q. Did you pay him the rate of wages that [32] you paid all other men who were working upon the steel part of the structure?

A. Yes; they all received the same wages.

Q. Was the wages you paid him taken into consideration as a part of the basis to fix the premium which you paid the company?

A. Yes, sir; every dollar of it.

Q. Where was this building being erected?

A. It is in the ten hundred block on Main Street; I don't remember the exact number of it,—1016 or 18.

Q. What was it known as,—what block?

A. It is the Tiner Block. It used to be the old Wheeler-Motter building.

Q. What is in there now?

A. The Manitou Hotel is above, and the Boz Theatre is in the lower story.

Q. Is that the place where the operations were performed that Mr. Sheppard solicited the insurance for?

A. That is the place where these operations were performed.

Q. Is that the location and the place where Mr. Irvin was working?

(Testimony of C. H. Lee.)

A. Yes, sir; that is the place on which he was working. Q. At the time of the accident?

ing.

Q. At the time of the accident?

A. At the time of the accident, and at all other times.

The COURT.—Did he state what this man was doing in fact?

Mr. FRASER.—I was just going to ask him that question.

Q. What was Mr. Irvin working at at the time of the accident? [33]

A. He was working with nine or ten other men, helping to move a steel girding, running it along to its place, to get hold of it with a derrick, to lift it up to its place in the story above; it was on the basement floor, where it was being handed.

Q. What steel work was there about that building to be constructed? What did it consist of,—the steel work,—where you had these men employed?

A. It consisted of putting into place either,—I think there were eight,—steel girders on top of that, partly resting on the columns, and one end resting on the walls. They are on the second floor, or the ceiling of the first floor.

Q. Did you have men there like machinists, running machinery there, or anything like that?

A. No.

Q. It wasn't a machine job was it?

A. No, just a plain piece of work; just lifting these girders up with a derrick and putting them in place.

(Testimony of C. H. Lee.)

Q. These men were classified in your payroll by you as steelmen, were they? A. Yes, sir.

Q. And you paid the premium called for in this policy on their wages? A. Yes, sir.

Q. Do you remember what day the accident happened down there? A. No, I don't remember.

(Judgment-roll marked Plaintiff's Exhibit No. 3.)

Mr. FRASER.—I offer in evidence judgment-roll in the case of J. C. Irvin vs. A. S. Whiteway & Co. [34]

Mr. Martin.—No objection.

(Said exhibit was thereupon marked "Admitted.")

Mr. FRASER.—This judgment-roll, if the Court please, contains the complaint in that action, setting forth that he was injured, against these parties, and the verdict of the jury, and the entering up of the judgment in that case giving the dates of it, which facts the defendant admits were shown thereby.

A certain check was thereupon marked Plaintiff's Exhibit No. 4.

Q. Now, Mr. Lee, calling your attention to Plaintiff's Exhibit No. 4, what is that?

A. That is a check for \$5,000.00 that was issued in payment of this damage suit, payable to Alfred A. Fraser, our counsel.

Q. Was that check returned to you from the bank and paid?

A. Returned cancelled, yes sir, and our account was charged up with \$5,000.00.

Mr. FRASER.—I would like to withdraw this witness for a few moments, and put on Mr. Paine, as he is in a hurry.

(Testimony of Karl Paine, for Plaintiff.)

KARL PAINE, a witness duly called and sworn on behalf of the plaintiff, testified as follows.

Direct Examination.

(By Mr. FRASER.)

Q. Mr. Paine, you reside in Boise? A. I do.

Q. And you are a practicing attorney at law?

A. Yes, sir.

Q. Were you one of the attorneys for the plaintiff in the case of J. C. Irvin vs. A. S. Whiteway and C. H. Lee, as [35] copartners, under the name of A. S. Whiteway & Company? A. I was.

Q. An action to recover damages for the plaintiff against them for injuries sustained in this city?

A. Yes.

(A certain check was thereupon marked Plaintiff's Exhibit No. 5.)

Q. Mr. Paine, I call your attention to Plaintiff's Exhibit No. 5. What is that?

A. That is a check for \$5,000.00.

Q. From whom did you receive it?

A. From yourself.

Q. Did you cash it? A. I did.

Q. And get the money? A. I did.

Q. What was that paid to you for?

A. That was paid to me as a compromise settlement of the judgment obtained in the action referred to by you in your question here a moment ago.

Mr. FRASER.—Is there any objection to the introduction of that check?

Mr. MARTIN.—We object to it as being incompet-

(Testimony of Karl Paine.)

ent, irrelevant and immaterial, and not proving payment.

The COURT.—Overruled.

(Said Plaintiff's Exhibit No. 5, was thereupon marked "Admitted.")

Mr. MARTIN.—The policy says "Paid in money."

Mr. FRASER.—Well, I asked him if he received the money on that.

Q. Did you receive the cash on that?

A. I did [36]

Q. Did you receive it as attorney for the plaintiff J. C. Irvin? As his attorney? A. I did.

Q. And on his behalf? A. Yes.

Mr. FRASER.—That is all, Mr. Paine,

Cross-examination.

(By Mr. MARTIN.)

Q. What did you do with the money, Mr. Paine, that you received on that check?

Mr. FRASER.—I think that is immaterial, unless the Court desires to know. I haven't any objection to his stating what he did with it.

The COURT.—Of course it is immaterial unless counsel offer to show that it was a mere feigned payment, and was returned.

Mr. MARTIN.—That is the purpose of the question.

Mr. FRASER.—Well, you can ask him if he ever returned that to me or anybody else except the parties entitled to it.

The COURT.—Well, if that is true, you may ask him any question you want to. He may answer the

(Testimony of Karl Paine.)

question you asked him.

A. My recollection of it is that I sent for Mr. Irvin as soon as I received the check, and took a check-book with me, and went to Mr. Nugent's office. He was associated with me as attorney in the case, for the plaintiff; and I asked Mr. Nugent to deposit the check for me in the Pacific National Bank, and I then wrote a check for two-thirds of five thousand dollars, [37] gave it to Mr. Irvin, and a check for one-third of five thousand dollars, and gave it to Mr. Nugent, and the balance remained in the bank to my credit, as an attorney's fee.

The COURT.—Don't you mistate? You said two-thirds to Irvin and one-third to Nugent.

A. I should say one-sixth to Mr. Nugent, and retained one-sixth, as full compensation for myself.

Mr. MARTIN.—Q. So far as you know, has this money reached Mr. Irvin, that is, the money in cash, to be used by himself?

A. Mr. Irvin got two-thirds of five thousand dollars, on my check.

Q. That was for his own use and benefit?

A. It was, Mr. Martin.

Q. And retained by him?

A. And retained by him.

Q. And it was the same way with the other two-sixths you mentioned?

A. The other two-sixths, yes, Mr. Nugent and I divided one-third in accordance with an agreement that we had with Mr. Irvin.

Mr. MARTIN.—That is all at this time.

Mr. FRASER.—That is all, Mr. Paine. [38]

[Testimony of C. H. Lee, for Plaintiffs (Recalled).]

C. H. LEE, a witness heretofore duly sworn, upon being recalled, testified as follows, on further

Direct Examination.

(By Mr. FRASER.)

Q. In the action of Mr. Irvin against A. S. Whiteway & Lee, who was the attorney for Whiteway & Lee, in defending that suit, Mr. Lee?

A. Yourself, Mr. Fraser.

Q. What did it cost you for attorney's fees in defending that suit? A. \$150.00.

Q. That is what you paid, but what was the agreed amount?

A. The agreed amount I think was \$500.00.

Q. And you have paid how much of that?

A. \$150.00.

Q. And the balance has not been paid yet by you to me? A. No, I haven't paid the balance.

Mr. FRASER.—That is all I desire to ask Mr. Lee at this time, Mr. Martin.

Cross-examination.

(By Mr. MARTIN.)

Q. I believe you said, Mr. Lee, that you didn't know Mr. Irvin?

A. I don't know him personally, I think; no.

Q. How do you know then what Mr. Irvin was doing when he was hurt?

A. Of my own knowledge, I don't know; I wasn't there; I didn't see him when he was hurt.

Q. Then that was hearsay that you testified to?

(Testimony of C. H. Lee.)

A. Yes, that part of it, that he was there working, —I didn't see him. [39]

Q. Did you have the payroll classified?

A. Yes, sir.

Q. According to instructions, as you say, that Mr. Sheppard gave? A. Yes, sir.

Q. When did you make that classification?

A. It was made by the foreman; the foreman on the job makes those classifications in the time-book.

Q. Did Mr. Sheppard tell you that they didn't have a rate for common laborers? A. No.

Q. Why was it that you didn't have him put in common laborers then, if you were so careful?

A. Because they were all included in the other classifications; didn't need any.

Q. When was it that you classified your payroll?

A. The foreman does that every day, in the time-book.

Q. That is, when a man went to work, he was classified right then and there by the foreman?

A. Yes. He puts them down, as to what they are doing, and at the end of the week he hands in the time-book to the office, and the man's name, and what he is doing, is in the time-book, and the rate they are paid. That is all done by the foreman, in the time-book. Then I make up my statements from that.

Q. Then from the time Irvin went to work you had him classified as a certain class of laborer?

A. Yes, as I understand it.

Q. Do you say you had him classified as a steel-man?

(Testimony of C. H. Lee.)

A. I wouldn't say that he was down on the job, written down in those words, steelman, but in the book, working on steel. [40]

Q. As a matter of fact, he was classified by your company as a common laborer, wasn't he?

A. No,—classified? He could be classified as a common laborer, probably; paying him laborer's wages.

Q. You say you were paying him laborer's wages?

A. Paying him laborer's wages, but his classification payment went right into the men on the steel classification, you understand.

(A certain accident report was marked Defendant's Exhibit No. 1.)

Q. Showing you Defendant's Exhibit No. 1, for identification, I will ask you if your company, A. S. Whiteway & Company, did not make out an accident report, in which you designated the occupation of Mr. J. C. Irvin as a common laborer.

A. I never saw this document; I couldn't give it any identification.

Q. Do you know Mr. A. S. Whiteway's signature?

A. Yes.

Q. Is that his signature?

A. That is his signature.

Q. And he is one of the partners of your company?

A. Yes.

Q. You never saw this?

A. I never saw that before, that I know of.

Mr. MARTIN.—I offer this at this time, as a part of the cross-examination of this witness, Defendant's Exhibit No. 1.

(Testimony of C. H. Lee.)

Mr. FRASER.—No objection.

(Said document was thereupon marked “Admitted.”)

Mr. MARTIN.—Q. Then you do not know whether Mr. Irvin was moving steel, shoveling dirt, handling brick, wheeling [41] concrete, and doing most everything there was to do, around the basement of the Tiner Building, when he was injured?

A. I wasn't there when he was hurt; I didn't see him, what he was doing.

Q. Well, as a matter of fact, Mr. Lee, that work being done at the time Mr. Irvin was injured was in cleaning out the basement, was it not?

A. State that again, please. I didn't quite catch the idea.

Q. As a matter of fact, the work being done at the time Mr. Irvin was injured was in cleaning out the basement of the building, rather than the erection of steel?

A. No, mostly in the handling of steel, sir.

Q. Isn't it a fact that the actual erection of steel at the time Mr. Irvin was injured had not commenced?

A. No, that is not true at all; that is away off.

Q. And you know that?

A. I know that to be a fact, because I visited the building every day, sometimes after quitting hours, and sometimes at the noon hour.

Q. What steel was in place at the time Mr. Irvin was injured? A. What steel was in place?

Q. Yes.

(Testimony of C. H. Lee.)

A. I don't think I could give you a detail of what steel was in place when he was injured.

Q. What was the first steel put in place in that building?

A. Columns, after the girders on the first story; they would be placed first; after the columns were erected the girders would be put on top of them, in the natural order. [42]

Q. Those I-beams with which Mr. Irvin was injured were moved backward and forward several times in that basement, were they not, from one side of the basement to the other?

A. No, that would be silly. They would be simply moved once, to their place; then erected by the derrick and put up where they belonged. People don't move those things around just for fun, you know.

Q. Then you say they were moved but once, to put them in place?

A. They would be delivered first at the building by the draymen; then they would be run down into the basement; then they would be put up under the derrick, wherever that was going to be erected, in their position; that is the idea. They would first be unloaded in the alley by the draymen, from the cars; then they would be put into the building on the floor of the basement, to get them out of the way; you wouldn't leave them in the alley. Then when a girder is to be put in its place, a derrick is put where it is properly arranged to lift that girder in its place, and the beam is then run under the derrick and picked up and laid in its place. That is the

(Testimony of C. H. Lee.)

way it is handled always.

Q. Were you at the trial of Irvin vs. Whiteway & Company, in the District Court?

A. I think I was there about five or ten minutes one day; that it all.

Q. Were you present during that trial when Mr. Irvin testified? A. No.

Q. You signed and swore to a complaint in this action now being tried, did you not? [43]

A. I can tell you when I see it.

Q. I now show you what purports to be a copy, and I will ask you if that is your signature.

A. Is that my signature?

Q. Yes. A. No, that isn't my signature.

Mr. MARTIN.—Your Honor, may I have the original?

The COURT.—The original, of course, wouldn't be here; that would be in the State court.

Mr. FRASER.—That is a transcript brought here, Mr. Martin; the original here is just a transcript.

Mr. MARTIN.—Just mark this for identification.

(A certain document was thereupon marked Defendant's Exhibit No. 2.)

Q. Showing you Defendant's Exhibit No. 2, for Identification, I will ask you if you did not sign and swear to that complaint, before D. T. Miller, notary public? A. This signature here?

Q. Yes. A. That isn't my signature.

Q. No, that is the copy. I will ask you if you did not sign the original, and swear to it before D. T. Miller, notary public.

(Testimony of C. H. Lee.)

A. Well, sir, I couldn't say as to that. I don't recall it, I am sure. This isn't my signature though; I can testify to that. I wouldn't say, sir, from recollection, that I did sign that; I don't know whether I did or not; I couldn't say.

Mr. MARTIN.—That is all we care to ask this witness at this time, but we will ask to be permitted to show him the original complaint in this action [44] filed and removed to this Court, and ask for the privilege of further cross-examination at the time we can produce that original.

The COURT.—If the complaint is here purporting to be signed by him, the Court must assume that it is signed by him.

Mr. MARTIN.—Then we offer in evidence at this time Defendant's Exhibit No. 2.

Mr. FRASER.—I object to it.

Mr. MARTIN.—It is a copy.

Mr. FRASER.—I don't know whether it is a copy or not.

Mr. MARTIN.—It is your office copy, and I will show it to you.

Mr. FRASER.—And the witness I don't suppose knows. What is it you want to find out about this? I don't understand now.

Mr. MARTIN.—Well, we offer that in evidence. There is a certified copy here in the files, I believe.

The COURT.—Yes, this is a certified copy. State to counsel for what purpose you offer it.

Mr. MARTIN.—We offer this for the purpose of showing that Mr. Lee swore to this complaint, where

(Testimony of C. H. Lee.)

he alleges that J. C. Irvin was a common laborer.

Mr. FRASER.—It is in evidence, I presume, a part of the records and files in this case.

Mr. MARTIN.—We offer it in evidence, and ask that it be admitted.

The COURT.—Very well; it may be received.

(Said Defendant's Exhibit No. 2 was thereupon marked "Admitted.")

Which was the original complaint in this action, a true copy of which is set out heretofore in this transcript and made a part of this record. [45]

Mr. MARTIN.—Q. I will ask you, Mr. Lee, if you did not sign and swear to a complaint in which it was alleged that on the 25th day of July, 1910, and prior thereto, one J. C. Irvin was in the employ of the plaintiff as a common laborer, working for said plaintiff on the construction of a brick building between Tenth and Eleventh streets, on Main street, Boise, Idaho?

A. You ask me if I did swear to such a statement?

Q. Yes, sir.

A. I tell you I have no recollection of it. I couldn't say whether I did; I doubt very much if I was in the city at that time; I may have done so, but I couldn't positively say.

Mr. MARTIN.—That is all.

Redirect Examination.

(By Mr. FRASER.)

Q. When the complaint was drawn in this action that is now pending, in the district court, who was your attorney to draw up that complaint?

(Testimony of C. H. Lee.)

A. This action?

Q. Yes. A. You were.

Q. And you signed the complaint which I prepared for you, did you, in this action; signed and swore to a complaint which I prepared?

A. I think I did; I am not positive whether Mr. Whiteway or whether I did; I don't recall.

Q. In any event, it was your counsel who drew up this complaint for you? A. Yes, sir.

Q. The facts were stated to me,—the facts which you [46] stated to me, and by reason of being your counsel in the other case? A. Yes, sir.

Recross-examination.

(By Mr. MARTIN.)

Q. Did you state the facts to counsel on which he drew the complaint? A. I beg pardon?

Q. Did you give the facts to counsel upon which he drew the complaint? A. Did I give the facts?

Q. Yes. A. I think I assisted, yes, sir.

Mr. FRASER.—I offer in evidence Plaintiff's Exhibit No. 4, the check for \$5,000.00 from White-way & Lee Construction Company to myself.

Mr. MARTIN.—No objection.

(Said Exhibit was thereupon marked "Admitted.")

Mr. FRASER.—That is all, Mr. Lee.

Mr. MARTIN.—That is all. [47]

[Testimony of Bradley Sheppard, for Plaintiffs.]

BRADLEY SHEPPARD, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. FRASER.)

Q. You reside in Boise, Mr. Sheppard?

A. I do.

Q. Were you the agent or representative in Boise during the year 1911 for the Pennsylvania Casualty Company?

A. I think I was. I wouldn't say when they stopped doing business here.

Q. Well, up until they stopped doing business?

A. Up until the time they stopped doing business, I was, yes.

(A certain letter was marked Plaintiff's Exhibit No. 6.)

Q. Calling your attention to Plaintiff's Exhibit No. 6, I will ask you if you prepared that document and sent it to A. S. Whiteway & Co.?

A. I assume that came from my office. I think that is all right. We send such a statement always.

Mr. FRASER.—I offer in evidence Plaintiff's Exhibit No. 6.

Mr. MARTIN.—No objection, Mr. Fraser.

(Said document was thereupon marked "Admitted.")

Mr. FRASER.—This is a letter from Mr. Sheppard, on the paper of the Pennsylvania Casualty Co.,

(Testimony of Bradley Sheppard.)

addressed to A. S. Whiteway & Co., Boise, Idaho.

(Reading exhibit.)

Q. Do you remember the incident of one J. C. Irvin receiving an injury in this town, Mr. Sheppard? A. I do. [48]

Q. Were you at the place of the accident shortly after the injury occurred? A. I was.

Q. Was Mr. Irvin still there when you got down there? A. No.

Q. He had been removed, had he? A. Yes.

Q. When did you make this investigation,—the same day as the accident?

A. I don't know exactly what you mean by investigation. I went there shortly after, and it was the same day as the accident, yes.

Q. It was the same day?

A. Yes. I don't know what you mean by investigation.

Q. Calling your attention to Defendant's Exhibit No. 1, did you ever see that document before?

A. Well, either this one or one just like it. I wouldn't swear to that signature on there.

Q. Well, what is your best judgment?

A. I judge this is the original one right here.

Q. Was that prepared on the usual blanks of the company for getting this information in cases of accident? A. Yes.

Q. And you prepared the blank?

A. No, they prepared the blank; they filled in this.

Q. Who filled it in?

A. Whiteway & Company.

(Testimony of Bradley Sheppard.)

Q. Do you mean all these blanks?

A. All this typewriting here.

Q. When was that done, the date it purports to be here? A. Yes. [49]

Q. Was it delivered to you by Whiteway & Company—this statement? A. Yes.

Q. What did you do with it?

A. Sent it on to the general agents of the company.

Q. Did you at any time after that have any conversation with Mr. Whiteway or Mr. Lee in regard to this accident?

A. With Mr. Whiteway I did, yes.

Q. Did you ever have any conversation with Mr. Irvin, the man that was injured? Did you go to see him? A. Yes.

Q. Did any other agents of the company come here to investigate this matter?

A. The adjuster of the company was here.

Q. The adjuster was here? A. Yes.

Q. Was that shortly after the accident?

A. No.

Q. It was some time after the accident? A. Yes.

Q. No adjustment was made, I understand?

A. No.

Q. What was the adjuster's name who was here, do you remember? A. John A. Coleman.

Mr. FRASER.—That is all at the present time.

Mr. MARTIN.—That is all. [50]

[**Testimony of A. S. Whiteway, for Plaintiffs.**]

A. S. WHITEWAY, a witness duly called and sworn on behalf of the plaintiffs, testified as follows, on

Direct Examination.

(By Mr. FRASER.)

Q. Where do you reside, Mr. Whiteway?

A. Boise.

Q. And you are one of the members of the firm of A. S. Whiteway & Company? A. Yes, sir.

Q. Are you acquainted with one J. C. Irvin?

A. Yes, sir.

Q. Do you remember the time that he received an accident in this town while he was working for your firm? A. Yes, sir.

Q. Whereabouts did that occur?

A. In the basement of the Tiner building.

Q. Between what streets?

A. Between Tenth and Eleventh.

Q. On Main? A. On Main Street.

Q. Do you remember what time of day it was, about the time of day?

A. It was between four and five o'clock in the afternoon.

Q. Had you seen Mr. Irvin during that day?

A. Yes, sir.

Q. What was he working at at this time?

A. He was working on the iron work.

Q. What do you classify it as?

A. He was under the pay-roll of iron workers.

Q. Iron or steel, or what is it?

(Testimony of A. S. Whiteway.)

A. Iron and steel, yes. [51]

Q. That is what he was at at the time of the accident? A. Yes.

Mr. FRASER.—That is all.

Cross-examination.

(By Mr. MARTIN.)

Q. You were in the district court when Mr. Irvin testified, in the case that Mr. Irvin brought against Whiteway & Company, were you not?

A. Yes, sir.

Q. And you heard Mr. Irvin testify, did you not?

A. I think so.

Q. You heard him testify that he was a common laborer, did you not? A. I don't think so.

Q. Will you say he did not testify that he was working as a common laborer?

A. I will not say so, but I will say that he testified that he was an iron worker and machinist, I think, at that time. I think he testified that he was getting \$4.50 or \$5.00 as an iron man or machinist.

Q. While working for Whiteway & Company?

A. No; that was preceding working for us.

Q. Do you remember him testifying that he was getting \$2.50 a day while working for you?

A. I think so.

Q. Do you remember that he testified that he was shoveling dirt, wheeling concrete, handling brick, moving steel, and doing most everything there was to do about there?

A. I don't remember classifying—I know he was moving steel at the time the— [52]

!(Testimony of A. S. Whiteway.)

Q. Would you say he was not shoveling dirt, wheeling concrete, and handling brick?

A. No. I will say he wasn't handling brick at that time. If he swore to that testimony, he swore falsely, because there wasn't any brick to be handled in that building at that time.

Q. Will you say he didn't say he was wheeling concrete? A. No, I wouldn't say.

Q. Was he wheeling concrete there?

A. I don't know. I don't think so. He might have.

Q. Was he doing most everything there was to do around there? A. He was.

Q. Would you say he did not say that?

A. I would not.

Q. He might have sworn to that then?

A. He might have, yes.

Q. You did not deny in that court down there that Mr. Irvin was a common laborer, did you?

A. I don't think so; I don't think I was on the stand at all in that case.

Q. You heard him testify to that?

A. I don't know. I can't remember what he testified to at that time.

Q. How much of the time were you present down there while that work was going on?

A. I was down there practically all the time from the start till the accident occurred, and after, until the building was completed.

Q. How long had Irvin been working there?

A. I couldn't say—perhaps a week or ten days—

(Testimony of A. S. Whiteway.)

perhaps more. [53]

Q. What other work would you say he was engaged in, outside of the—

A. I don't say he was engaged in any other work outside of the steel work.

Q. Will you say he was on that work all the time he was in your employ? A. I think he was.

Q. Handling those steel beams?

A. He might have been sweeping the floor, in order to get the floor clean, to remove the beams, or some dirt, necessary to get a clear way to run the steel. He might have been taking a shovel occasionally and shoveling the dirt, so that he could move the steel, which a steelman would do, or anybody else, if he had to move steel.

(A certain transcript was marked Defendant's Exhibit No. 3.)

Q. Showing you Defendant's Exhibit No. 3, for identification, which purports to be the transcript of the reporter's notes, in the District Court, in the case of Irvin vs. Whiteway & Company, at page four, I will ask you if, while you were present and listening to Mr. Irvin's testimony, this question was not asked and answered in this form: "What was the nature of your work? A. Well, it consisted of moving steel, and shoveling dirt, and handling brick, wheeling concrete, and most everything there was to do around there."

A. I couldn't answer that question. I don't know whether that question was asked and answered or not.

(Testimony of A. S. Whiteway.)

Q. Well, if that question was asked, was that true?

Mr. FRASER.—I object to that, asking him if it was.

The COURT.—He has already answered that it was [54] not true, in one respect at least.

A. It was not true in the brick work.

Mr. MARTIN.—Q. Was it true as to shoveling the dirt?

A. I don't know. He might have shoveled dirt, I say, in clearing for the steel, or something of that kind, which would come in a steelman's line; if there was any obstructions in the way he would move them.

Q. Was it true as to handling brick?

A. No, it wasn't.

Q. As to wheeling concrete?

A. I couldn't say; it might have been.

Q. Was it true as to doing most everything there was to do around there?

A. I don't know whether that question was asked or not. I know there was one item in there that is not true.

Mr. MARTIN.—We offer in evidence Defendant's Exhibit No. 3, as to page 4 of said exhibit, as part of the cross-examination of this witness.

Mr. FRASER.—We object to it as incompetent, irrelevant and immaterial, and the statements made by the witness Irvin in the other case would not be binding upon us in this case. He wasn't our witness, or anything of the kind. We might not desire

(Testimony of A. S. Whiteway.)

to cross-examine him in that suit, and we might desire to do so at this time. We are not bound by his statements.

The COURT.—Sustained.

Mr. MARTIN.—Q. Showing you Defendant's Exhibit No. 1, for identification, I will ask you if you signed that report?

A. That is my signature, yes, sir. [55]

Q. And did you turn that report over to Mr. Sheppard? A. As it is?

Q. Yes.

A. I wouldn't swear to that. When the accident occurred, I had blanks; I think the blanks were entirely different from this though; and it was made out, giving a report of the accident; but I wouldn't swear that I typewrote this copy. I know this is my signature. I signed it. But I wouldn't swear that I typewrote that. I know I made out a form, and I think it was written in longhand, and I think the company has an accident form to be submitted in forty-eight hours after the accident. I wouldn't be positive whether I wrote that.

Q. You admit, however, that you signed this report? A. Yes, sir.

Mr. MARTIN.—That is all.

Mr. FRASER.—That is all, Mr. Whiteway. That is all.

Mr. MARTIN.—Is that your case?

Mr. FRASER.—Yes.

Mr. MARTIN.—We will call Mr. Sheppard.
[56]

[Testimony of Bradley Sheppard, for Defendant.]

BRADLEY SHEPPARD, a witness heretofore duly sworn in behalf of the plaintiff, upon being recalled as a witness for the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. I believe you have already stated, Mr. Sheppard, that you were the agent for the Pennsylvania Casualty Company at the time this policy in question was taken out? A. I was.

Q. Just state the circumstances surrounding the entering into the contract between the Pennsylvania Casualty Company and Whiteway & Company, what you did as agent, and what Whiteway & Lee did.

A. I was called first by phone by someone from Whiteway & Lee's office, and asked to come over and figure on writing an employers' liability policy on some construction work they were about to do. I went over to Whiteway & Lee's office, and saw Mr. Lee, and was asked to give figures and rates for an employer's liability policy on a construction job known as the Tiner Building, which had been destroyed some time before that by fire. He gave me a list of people whom he wanted to cover, and I quoted him the prices of the different occupations, and a little later secured his consent to write the policy, which was done.

Q. Did you name the laborers that would be covered by this contract? A. I did not.

Q. Or did he name them? A. He did.

(Testimony of Bradley Sheppard.)

Q. Was there any discussion as to what these different [57] classifications covered?

A. No discussion about it.

Q. He simply gave you the names of the bricklayers, masons, etc.? A. Yes.

Q. What did you do with that list, or what did you do with those classifications he gave you?

A. I quoted him prices on them.

Q. And did he give you a classification of labor known as common laborer? A. No.

Q. Was there any conversation at that time concerning any of the classifications covering common laborers? A. I don't recall any; I think not.

Q. At that time did you have a rate for common laborers?

A. I think so. We are in the habit of issuing policies for common laborers.

Q. Did he ask you for a rate on common laborers?

A. He did not.

Q. Was there anything said about the classifications named by him as covering those engaged in common labor? A. Not that I recall.

Q. Did you know whether the schedule that he gave included all of the kinds of labor that he would have working on that building?

A. I couldn't say definitely about that; sometimes we cover everyone on the building; sometimes we do not. Much of the work at times is subcontracted, and we don't cover the subcontractors at times, and at times we do. I can't recall all the details as to that. [58]

(Testimony of Bradley Sheppard.)

Q. Then your recollection is that he gave you this list of laborers and classified them? A. Yes.

Q. And you took them as he gave them to you and put them in the policy? A. Yes.

Q. Were you covering plumbers in that policy?

A. I don't know. I wouldn't say whether they are classified there or not; I don't think they are. I don't remember the policy exactly.

(Mr. Martin handed policy to witness.)

A. No.

Q. Do you know whether there were any plumbers working for Whiteway & Lee there on that building? A. I do not.

Q. Was it your intention to cover just the class of laborers given in that schedule? A. Yes.

Q. Now you had a rate, did you, for common laborers? A. Yes.

Q. Did you also have a rate for steelmen?

A. Yes.

Q. Was there any difference in the rate for common laborers and the rate for steelmen? A. Yes.

Q. Do you remember what the rate for common laborers was? A. Mostly \$1.50.

Q. And this rate you gave on steelmen I believe was \$6.50?

A. I do not remember—whatever it shows in the policy there. [59]

Q. Now, after Irvin was injured, did you receive any notice of the injury, as agent for the company?

A. Yes.

Q. That was the report of the accident?

(Testimony of Bradley Sheppard.)

A. Yes.

Q. Showing you Defendant's Exhibit No. 1, I will ask you if that is the report that you received?

A. That is the same thing I had before.

Q. Is that in the same form that it was at the time you received it, as near as you know? A. Yes.

Q. This report you sent on to the main office of the company? A. The general agents.

Q. Showing you Plaintiff's Exhibit No. 1, the insurance policy in question, I will ask you where you get your information, or from what source you put in the words on the typewriter, "No exception," after statement 6?

A. That is a copy of the application for the policy given at the time of the application, generally.

Q. And who makes out the application?

A. Generally the agent does. He asks those questions.

Q. In this instance, do you know who did?

A. I think I did.

Q. Who furnished you the information from which you filled out the blanks in the application?

A. Mr. Lee.

Q. Then after the application is filled in, from information received, as you say, from the person asking the insurance, you make out what is termed here the declarations, on page 3, from that application?
[60]

A. The application goes to the general agent. I do not issue those policies. The general agent or the home office issue an employer's liability policy.

(Testimony of Bradley Sheppard.)

No local agent I have ever known of issues that policy. The application is sent to the general agent. The application covers what is desired in the policy, and the policy is made according to the statements of that application. Then the policy is sent back to the resident agent, who in turn countersigns the policy, as he may wish or not, and delivered to the assured.

Q. Well, these words "No exception," after statement 6, and statement 7, or statement 8, statement 9, statement 10, statement 11, on the third page of this Plaintiff's Exhibit 1, are placed in there from information received on the application made out by the insured, is that right?

A. That is the way it is always done.

Mr. MARTIN.—That is all.

Cross-examination.

(By Mr. FRASER.)

Q. Have you issued a good many policies of this character, Mr. Sheppard? A. A great many.

Q. You have written a great number of them?

A. Yes.

Q. Is it a common thing for contractors to require these insurance policies, or procure them, rather?

A. Yes.

Q. When they make application to you, do you go down and look over the location of their work, or pay any attention to what their work is going to be?

[61]

A. Generally speaking, not.

Q. Now, under the term of "Plasterers" here, it

(Testimony of Bradley Sheppard.)

says, "Estimated number five to ten, wages \$800.00, and rate \$1.20." Under that classification there, would that include a hod-carrier for the plasterer, or would it be just the fellow that would put on the mortar?

A. My version of it would be the plasterer himself.

Q. You think nobody but them. Well, about the bricklayers and masons, would that cover anybody but just the men that were putting the brick on the wall? Is that the way you construe that, that nobody is insured except just the one man?

A. Possibly I can explain that in another way. We consider masons and their helpers only masons.

Q. Wouldn't you require them to pay the premium on their pay-roll of these other men, as well as the fellow who laid the brick on the wall, Mr. Sheppard?

A. Not if that classification were not mentioned in there.

Q. Do you mean to say now that in all these policies you have drawn up for these men that you gave them the understanding that the men upon whom they were paying premiums, and were insured, and then when an accident happened that only a certain number of them were insured, after you had taken the premium on the others?

A. Well, as to the premium feature, you may be sure they are not going to pay the premium only on the estimated compensation, as shown in the policy. Now, it is a very usual thing to cover a contractor,

(Testimony of Bradley Sheppard.)

and cover only a very few of his men.

Q. That is when he asks for that kind of a contract? A. Yes. [62]

Q. But when he is putting up a building, and asks for a contract of classification, such as here, which evidently intends to take in at least to a certain extent the men that are employed in the different departments, for instance, such as steelmen,—do you know what the steelmen did in these buildings?

A. I know what our accepted idea of them is.

Q. Now, your premium on steelmen, as I understand, is about the highest premium you have got?

A. Yes.

Q. What do you recognize as a steelman, then,—men that handle these girders, work with the steel that goes into the construction of a building?

A. Well, I recognize that that is the point at issue, and I am not going to say that I can establish what a steelman is for you.

Q. Now, common laborers, you say you have a classification for common laborers. The rate on their wages is a good deal less than it is on this steel classification, isn't it? A. Yes.

Q. Now, do you remember of writing any of these policies for the contractors that were putting up these buildings, such as this was, and then having a classification in addition to these of common laborers? A. Oh, yes.

Q. Sometimes that has been done? A. Oh, yes.

Q. Now, would a brick layer be a common laborer?

A. No.

(Testimony of Bradley Sheppard.)

Q. Plasterer? A. No. [63]

Q. Hod-carriers?

A. That is a question I don't know—

Q. Well, then, it is pretty hard to tell, isn't it, Mr. Sheppard, what is included in these general classifications?

A. It is a good deal up to the contractor at times.

Q. You wouldn't know, you say—there is no plumber mentioned in here,—you don't know whether Whiteway & Lee had the contract for putting any plumbing or heating in that building, do you? A. No.

Q. If they didn't have such a contract they wouldn't want to insure any plumbers, would they?

A. No.

Mr. FRASER.—That's all.

The COURT.—I think I will ask one question. You may object, either side, if you desire.

Q. Suppose it were frankly stated to you, Mr. Sheppard, that a man was to be employed in moving steel girders and beams, and erecting them, would you write a policy upon a man of that kind for the common labor rate, or would you exact a higher rate?

A. I would exact a higher rate.

Mr. FRASER.—I have no objections.

(A certain policy was thereupon marked Defendant's Exhibit No. 4.)

Redirect Examination.

(By Mr. MARTIN.)

Q. Showing you Defendant's Exhibit No. 4, Mr. Sheppard, I will ask you to state what that is?

(Testimony of Bradley Sheppard.)

A. Liability policy issued to Fred G. Mock.

Q. In that policy you had a common laborer classification? [64] A. Yes.

Q. And gave the common laborer classification and rate? A. Yes.

Q. Of how much? A. \$1.50.

Mr. MARTIN.—We offer this in evidence as part of the redirect examination of this witness.

Mr. FRASER.—It is objected to as incompetent, irrelevant and immaterial. It is a policy that he wrote for somebody else. He stated that he had a classification for common laborers, and that it was issued in the policy sometimes.

The COURT.—Sustained.

Mr. MARTIN.—Q. If you knew a lot of common laborers were to be used in handling and erecting heavy steel, what would be the action of the company, if it were made known to them?

Mr. FRASER.—I object to that as incompetent, irrelevant and immaterial.

Q. What would you do before issuing the policy?

Mr. FRASER.—I object to that as immaterial.

The COURT.—It don't seem to me that that comes within any showing in the record at present; that is, there is no showing here that common laborers were used in erecting steel, a lot of common laborers used for erecting steel, in this particular case.

Mr. MARTIN.—That is all.

Mr. FRASER.—That is all. [65]

[Testimony of J. C. Irvin, for Defendant.]

J. C. IRVIN, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. You may state your name.

A. J. C. Irvin.

Q. Where do you reside, Mr. Irvin. A. Boise.

Q. Were you in the employ of Whiteway & Lee in July, 1910? A. Yes, sir.

Q. What was the nature of your work?

A. Well, it consisted of anything there was to do, such as handling steel and concrete, dirt, brick, or anything there was there to do.

Q. Were you working at your trade for them?

A. No, sir.

Q. What were you working at for them?

A. I just got through telling you it was steel work, or anything they had to do, steel work, brick work, concrete, or anything they told me to do.

Q. Were you working for Whiteway & Lee as a common laborer?

A. Drawing common laborer's wages.

Mr. FRASER.—I object to that. He just told the Court what he was doing. It is a conclusion of the witness; that would be a conclusion. Let him tell the facts, which he has stated, what he was doing.

The COURT.—Yes, I think so. I don't know just what is in counsel's mind, when he says "common laborer." I have an impression what that means.

(Testimony of J. C. Irvin.)

When a man says he is a common laborer I have some sort [66] of an idea as to what is meant.

Mr. MARTIN.—Q. Did you furnish any tools?

A. No, sir.

Q. Just working with your hands?

A. And what tools they furnished.

Q. What salary did you receive, or pay?

A. \$2.50.

Mr. FRASER.—That is immaterial. There is nothing in the policy that requires them to pay a steelman any particular salary. There is a condition that they must pay a premium on the salary they do pay.

The COURT.—I shall let him answer. Did you answer the question? A. Yes, sir.

Mr. MARTIN.—Q. Had you had any experience in handling steel?

Mr. FRASER.—That is objected to for the reason that there is no qualification laid down in the provisions of this policy that a man has to possess certain qualifications to work at any of these particular trades.

The COURT.—He may answer. The objection is overruled.

A. Not in that line of steel.

Q. As I understand it, you were a machinist by trade? A. Yes, sir.

Q. Had you ever had any experience in handling steel girders? A. No.

Q. Did you work with a wheel barrow part of the time, wheeling concrete? [67]

(Testimony of J. C. Irvin.)

to the same thing. [69]

Q. I will ask you this question: If you did not answer to this question, "Were you working at your trade for them?" and your answer was, "No, sir, I was working as a common laborer."

Mr. FRASER.—I object to that as calling for the conclusion of the witness. He may ask this witness the question. I object to him reading that testimony, and asking the witness to say whether he testified to it.

The COURT.—Sustained.

Mr. MARTIN.—Is it sustained, your Honor, on the ground of asking for a conclusion of this witness?

The COURT.—It isn't important what he testified to in the other case, unless it tends to impeach him. If he stated the specific facts here, it appears to be common labor. The witness appears to be frank here; and that may be enough for the Court.

Q. Did you receive the payment of your part of the judgment? A. Yes, sir.

Q. Or your part of the payment, the judgment you received in the case in the lower court?

A. Yes, sir.

Q. And you received that for your own use and benefit, and did not turn it back to the company in any way?

A. I received it for my own use. I didn't turn it back.

Q. What part of that judgment did you receive?

A. What part of it?

(Testimony of J. C. Irvin.)

Q. Yes. A. I received \$3,333.33.

Q. Where did you put that money you received?
[70]

Mr. FRASER.—I object to that as immaterial and irrelevant and incompetent.

Mr. MARTIN.—We are denying the payment, your Honor, and while it does seem as if we have traced this payment to quite a considerable length, we would like to ask this one further question.

The COURT.—Very well.

A. In the Idaho National Bank.

Q. To your own account? A. Yes, sir.

Mr. MARTIN.—That is all.

Cross-examination.

(By Mr. FRASER.)

Q. Mr. Irvin, the only steel work that was going on in the construction of that building was what you would term structural steel work, was it?

A. Sir?

Q. The only steel work that was going on there in the erection of that building was what you would term structural steel work? A. Yes, sir.

Q. You were working at the time of the accident with seven or eight other men, engaged in that structural steel work? A. Yes, sir.

Q. Doing the same class of work they were doing?
A. Yes, sir.

Mr. FRASER.—That is all. [71]

Redirect Examination.

(By Mr. MARTIN.)

Q. Do you belong to the structural steel worker's

(Testimony of J. C. Irvin.)

union? A. No, sir.

Q. Did you ever have any experience in handling structural steel? A. No, sir.

Mr. MARTIN.—That is all.

Recross-examination.

(By Mr. FRASER.)

Q. Do you know whether there is a structural steel worker's union here or not? A. I do not.

Mr. FRASER.—That is all.

Mr. MARTIN.—We will call Mr. Whiteway.

[Testimony of A. S. Whiteway, for Defendant.]

A. S. WHITEWAY, a witness heretofore duly called and sworn on behalf of the plaintiff, upon being recalled in behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

(A certain report was marked Defendant's Exhibit No. 5.)

Q. Showing you Defendant's Exhibit No. 5, for identification, I will ask you if you signed that waiver? A. Yes, sir, I signed that.

Mr. MARTIN.—We offer this in evidence, your Honor, as Defendant's Exhibit No. 5.

Mr. FRASER.—We object to it, if the Court please, as incompetent, irrelevant and immaterial, and it doesn't tend to disprove any allegation in [72] this complaint. You might state shortly to the Court what that is.

Mr. MARTIN.—That is the waiver. The waiver

(Testimony of A. S. Whiteway.)

is what we are offering it for, your Honor.

The COURT.—Well, it may go in. I don't know whether it is very material or not.

(Said Defendant's Exhibit No. 5, was thereupon marked "Admitted.")

Q. You signed this instrument, Defendant's Exhibit No. 5, in the office of Karl Paine, did you not?

A. Yes, sir.

Q. And Karl Paine was at that time the attorney for J. C. Irvin, was he not? A. Yes, sir.

Q. Mr. Whiteway, you also told another attorney in Boise to go and see Mr. Irvin, to get his case, did you not?

Mr. FRASER.—I object to it as incompetent, irrelevant and immaterial. I don't see what it has got to do with this case.

The COURT.—Is the matter pleaded?

Mr. MARTIN.—Yes, your Honor.

Mr. FRASER.—Even if he did, it don't affect the right to recover under this policy. There is no provision or term in this policy that that constitutes any forfeiture, or anything of that kind, and if a man got injured I think he would have a right to tell him to hire an attorney.

The COURT.—He may answer.

(Last question read.)

A. I didn't solicit the attorney in order to do that. I was called to Mr. Irvin's residence over the phone, and I went [73] out there, and he wanted some money to pay his rent. It was after he got home from the hospital, and he had no work for the time

(Testimony of A. S. Whiteway.)

he was tied up in the hospital, and didn't have any money, and it was at that time that I loaned Mr. Irvin,—I don't know how much—sixty or seventy-five dollars, on a note; I took his wife's note for it. And during the time I was there this conversation came up, and he said he was going to have an attorney represent him, and I recommended Frank Kinyon. Frank Kinyon went out there and saw him, I think, and he wouldn't have Frank Kinyon, and went to these other attorneys, and which I didn't have anything to do about.

Q. You told Frank Kinyon on the corner of Ninth and Idaho streets?

A. I met him somewhere; I don't know where. I told him that Irvin wanted an attorney, yes, sir.

Q. And at that time you had in your possession the insurance policy, which provided that you should lend at all times to the company all the co-operation and assistance in your power?

A. I don't know that I did.

Q. Don't you know that you contracted that, that you were to render to the company all the co-operation and assistance in your power?

A. I did, yes, but that wasn't against the company; I didn't do anything against the company.

Q. You also signed this statement, waiving the statutory notice, in the office of the attorney for Irvin, did you not? A. I signed that waiver, yes.

Q. Is it also true that you didn't know you were injuring the company then?

A. That I didn't know? No, I didn't think I was

(Testimony of A. S. Whiteway.)

injuring the company. [74]

Q. Did you think that you were—

A. It was simply—I signed it, with the understanding that it was simply showing how the accident occurred.

Q. Who did you get the understanding from?

A. From the attorneys. Q. Which attorney's?

A. Paine. Q. And who else?

A. That is all that I know, Karl Paine. I didn't understand that I was signing any rights of the company away.

Q. Did you read that when you signed it?

A. I don't know whether I did or not. I don't remember that. I remember signing it.

Q. Didn't you turn over this policy to Frank Kinyon also at the time you told him to go out there?

A. No, sir, I didn't have the policy in my possession.

Q. You have always had it in your possession?

A. I didn't have it. I never saw the policy. Mr. Lee had control of the policy at all times, in the office, and I never saw those policies until this accident came up.

Q. And you don't know whether Mr. Lee turned it over to Mr. Kinyon or not? A. I do not, no, sir.

Q. Do you know whether Mr. Lee turned this policy over to Mr. Karl Paine or not?

A. I do not. Mr. Lee's testimony would be best on that matter.

Mr. MARTIN.—That is all. [75]

(Testimony of A. S. Whiteway.)

Cross-examination.

(By Mr. FRASER.)

Q. This Defendant's Exhibit No. 5, who was it requested you to accept service of this?

A. Karl Paine.

Q. Mr. Paine, in his office? A. Yes, sir.

Q. You just accepted service of this notice of the accident? A. Yes, sir, that is all.

Redirect Examination.

(By Mr. MARTIN.)

Q. Were you up there in Paine's office concerning this injury to Irvin?

A. No. Mr. Paine called me up there to sign this notice, and I went up and signed it. I understood at the time it was signed that they were going to settle, and they wanted that data in order to settle with the bonding company.

Q. And you don't know whether you read that or not?

A. I don't know whether I did or not; I presume I did, or else I wouldn't sign it.

Q. And that understanding you just mentioned concerning the settlement, I suppose you also got that from Mr. Paine, did you?

A. I understood the company was going to settle and they wanted my release there; they were going to compromise this settlement with Mr. Irvin.

Mr. MARTIN.—That is all. [76]

[Testimony of A. A. Fraser, for Defendant.]

A. A. FRASER, duly called and sworn as a witness for the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. Mr. Fraser, you were the attorney for Whiteway & Company in the cause of action brought by Mr. Irvin against Whiteway & Company, your clients, were you not? A. I was.

Q. And you drew and prepared the answer of Whiteway & Company in that case, did you not?

A. Yes, I did.

Q. Did you not admit in that answer that J. C. Irvin was a common laborer?

A. Well, I don't remember, Mr. Martin. I think now,—I know that he was called a common laborer in the complaint, and in drawing the complaint in this action I had those files, and I drew the first complaint in this action and called Mr. Irvin a common laborer. I afterwards discovered, some time later in fact, looking over the complaint, and saw where he was called a common laborer, and I asked to amend by changing it to steelman. It is probable that in the answer it wasn't denied, because in that case we wasn't particular what we called him.

Q. There was no particular reason why you shouldn't call him what was true?

A. In that case he was entitled to recover from Mr. Whiteway whether a common laborer or steel man, so there was no necessity for disputing what he was, in the case of Irvin V. Whiteway, and the complaint

(Testimony of A. A. Fraser.)

called him that, and I presume I left it that way, without denying it. [77]

Q. Well, I will show you the answer.

A. I drew the answer.

Q. And I will ask you if, anywhere in that answer, there is a denial of the allegation that Mr. Irvin was a common laborer?

A. Well, I don't want to take the time to read it over. If it isn't in here it isn't,—unless you want me to take the time. I will look at the complaint,—allegation three of the complaint,—and in the answer—I notice the answer admits paragraph three of the complaint. It doesn't deny any part of that. The answer says nothing about it. It admits it by failing to deny.

Q. You are also the attorney for Whiteway & Company in this present action, and you prepared the complaint of Whiteway & Company, did you not?

A. In this action? Q. Yes.

A. Yes, sir, I did.

Q. Who furnished you the facts upon which you drew the complaint in this action?

A. I was familiar with the facts, by reason of going through the other action. The policy was turned over to me, and I had the policy in my possession, and office copies of the pleadings and judgment in the action of Irvin v. Whiteway.

Q. I suppose you had also talked to your clients, Mr. Whiteway and Mr. Lee, concerning this?

A. I don't know that I had at the time I drew this answer. I talked to them during the trial, and prior

(Testimony of A. A. Fraser.)

to the trial of the other case.

Q. Well, upon such information as you acquired, you drew the complaint, and alleged that Mr. J. C. Irvin was a common laborer? [78]

A. Yes, the original complaint had that allegation.

Q. And that complaint stood as your pleading in this court until the 24th day of September, 1912?

A. I don't remember the date—somewhere about there.

Q. And on that date you asked the attorneys for the defendant to allow you to amend that complaint by striking from the complaint the words "common laborer" and substituting therefor the words "steelman, whose entire compensation is included in the estimated compensation as shown in statement three of the declarations of said policy."

A. Yes, there was a stipulation to that effect signed by attorneys for both sides.

Q. At that time who furnished you the information upon which you desired to change your complaint from a common laborer to a steelman?

A. The case was about at issue, and about to be tried at that term of court, and in getting out the files I took out the complaint, and also the policy, and in looking it over I discovered that common laborer wasn't designated as a separate classification in that policy, and I therefore desired to change that to steelman, as the evidence showed that he was working on the steel. I discovered it in the other trial. I wanted to plead according to the facts, that the man was working on the steel when he was injured, as the

(Testimony of A. A. Fraser.)

evidence showed in the other case, and I discovered it myself.

Q. You say you discovered the facts from an inspection of the policy along about that time?

A. In getting out the pleadings and the policy, and the complaint and answer, and going over the complaint and policy, I discovered that common laborer wasn't placed in a classification by itself in the policy, and therefore I desired to make the change.
[79]

Q. You discovered that it wouldn't do for that allegation to stand in the complaint, that he was a common laborer?

A. I didn't know whether it would or not, but I desired to bring it within the terms of the work the man was working at.

Q. And in order to do that you wanted to change the allegation from the allegation as it stood, that he was a common laborer, to the allegation as you thought it would be covered by the policy, and make him a steelman?

A. I don't know as to that. He might be a common laborer and working on the steel, or a steelman might be a common laborer, as far as I know. I told you there was no classification of common laborer. They had called him that in the other suit, and I had drawn the pleadings in this case from the old pleadings in the other case, without taking any particular notice of the policy at that time, or its terms or conditions.

Q. And Mr. Lee, I think it was, that swore to that complaint?

(Testimony of W. L. Hammond.)

A. Yes; when the complaint was drawn I telephoned to Mr. Lee to come over and sign it.

Mr. MARTIN.—That is all. [80]

[Testimony of W. L. Hammond, for Defendant.]

W. L. HAMMOND, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. What is your full name?

A. W. L. Hammond.

Q. Where do you reside? A. Boise, Idaho.

Q. What is your occupation?

A. Building inspector.

Q. Building inspector of the city?

A. Of the City of Boise.

Q. Have you had experience in construction of buildings? A. Yes, sir.

Q. And building trade or business? A. Yes, sir.

Q. Over how long a time does that experience of yours extend? A. About fourteen years.

Q. And do you know what the term “common laborer,” as used in the building trade or business, and the term “steelman,” as used in that trade or business, is?

A. I will say that that is quite a broad question, but in the line of steel work or steel worker, in this country, I haven’t had experience. I am not quite positive just what to say, but in the east, where I came from,—Indiana—

Mr. FRASER.—I object to that, if the Court

(Testimony of W. L. Hammond.)

please, as incompetent, irrelevant and immaterial, what they are in the east; and second, the policy requires no conditions or qualifications in regard [81] to a man working in these different classifications, but the only condition is that he pay the higher rate of premium, according to the work he is at.

The COURT.—The objection is sustained, as to what he was going to say about the east.

Q. I will ask you this, Mr. Hammond: Where a firm of contractors was engaged in the construction of a certain building, a four-story brick building, in Boise, and had in their employ a man the nature of whose work consisted in moving steel, shoveling dirt, handling brick, wheeling concrete, and in doing most everything there was to do around the building, and whose wages were \$2.50 per day, would you say this man was working at that time for those contractors in the capacity of a steelman or in the capacity of a common laborer?

Mr. FRASER.—I object to that as calling for the conclusion of the witness, and immaterial and irrelevant.

The COURT.—I think I shall let him answer. I don't know how much value it will have, or whether the witness could intelligently answer that question without knowing more about it perhaps.

Mr. MARTIN.—You may answer.

A. I would class that kind of a man as a general utility man. If you want to know, in my own ideas and my experience, what a steelman is, or a steel worker, I can tell you.

(Testimony of W. L. Hammond.)

Mr. FRASER.—I object, as the witness hasn't shown himself qualified to testify to that.

The COURT.—Well, ask your next question. There is nothing before the Court.

Q. Would you call that man a common laborer or a steelman? [82]

The COURT.—Well, he has answered that he would call him a general utility man. Perhaps he wouldn't call him either a steelman or a common laborer.

Q. Would you call him a steelman?

A. A steelman can be turned either shifting steel—

The COURT.—Either what?

A. Erecting, in the erection of steel, or shifting steel on the ground or in the air.

Q. Was this man that I have described here in this question, as moving steel, shoveling dirt, handling brick, wheeling concrete, and in doing most everything there was to do around the building, whose wages were \$2.50 per day, a steelman?

Mr. FRASER.—I object to that as incompetent, irrelevant and immaterial. The witness has already answered the question.

The COURT.—I think the responsibility of answering that question the Court will have to assume. It is a mixed question, perhaps.

Mr. MARTIN.—We are perfectly willing that the Court should answer that question, but we are offering this for the purpose of giving such light on the question of what is a common laborer or steelman as we think might possibly be of use to the Court.

(Testimony of W. L. Hammond.)

The COURT.—I understand the purpose, and this question is pretty near the line, but it seems to me that you are asking, not exactly an expert question, but a conclusion of law. You are practically asking whether this man, under these particular circumstances, should be called a steelman in this contract. Suppose, for instance, that a skilled steel workman, [83] one whose trade and qualifications were undisputed, were employed in the building, in a building of this kind, and he worked there six days, and in those six days he worked an hour moving brick, and an hour shoveling dirt, or in transferring concrete from one part of the building to another an hour, and the balance of the time was put in in erecting and moving steel, and he only got \$2.50 a day, that might present an entirely different picture to a witness' mind than some other condition put before him.

Mr. MARTIN.—I will add this to the information set forth in that question:

Q. (Continued.) Also taking into consideration the fact, as shown here also in the evidence, that this man was a machinist by trade.

The COURT.—I think I will let you go this far, and that is about as far as you can go, as to what a steelman is in his understanding, and what the duties of a steelman are, what line of work he does, what is a steelman, what does he do, when he is working as a steelman. You may ask him that question, if you desire to.

Mr. FRASER.—I think the witness has answered that question.

(Testimony of Frank H. Paradise.)

The COURT.—Possibly he has, but I am not sure that counsel feels that he has answered it fully enough. You can pursue that to any reasonable length.

Mr. MARTIN.—Well, we are satisfied with the hypothetical question. That is all, Mr. Hammond.

Mr. FRAZER.—That is all, Mr. Hammond.

Mr. MARTIN.—If your Honor please, we have about [84] four building contractor witnesses, and one of them isn't here at the present time, and if we could adjourn until Monday morning we would appreciate it. We could get these four here at that time, and not have to telephone for Mr. Dean.

The COURT.—Can't you put those that are here on now?

Mr. MARTIN.—Yes, we can, your Honor.

The COURT.—And, if necessary, I will leave the case open until Monday morning.

[Testimony of Frank H. Paradise, for Defendant.]

FRANK H. PARADISE, a witness duly called and sworn in behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. State your name.

A. Frank H. Paradise.

Q. Your residence and occupation and profession.

A. Boise, Idaho, and I practice the profession of architecture.

Q. How long have you been practicing the profes-

(Testimony of Frank H. Paradise.)

sion of architecture? A. About eight years.

Q. Are you acquainted with the definition or meaning of the term steelman, as used in the building trade or business? A. I am.

Q. Are you also acquainted with the term "common laborer," as usually described in the classification of labor, in the building trades business?

A. I am. [85]

Q. Will you please define what a steelman is, in a building?

Mr. FRASER.—I object as incompetent, irrelevant and immaterial. The witness hasn't shown himself qualified to answer. The fact that he is an architect is not sufficient foundation.

The COURT.—Overruled. Answer the question, Mr. Paradise.

A. State the question again.

The COURT.—What is a steelman, as you understand it?

A. I couldn't answer about a steelman. I could tell you about a structural steelman, but I couldn't answer the question as to a steelman.

Q. You do not know, then, what a steelman is in the building trade?

A. Not under that term, I do not.

Q. Do you know what a common laborer is?

A. I do.

Q. What are the marks by which you can distinguish a man as a common laborer in the building trades profession?

Mr. FRASER.—I object to it as incompetent, ir-

(Testimony of Frank H. Paradise.)

relevant and immaterial, and calling for the conclusion of the witness.

The COURT.—He may answer.

A. A common laborer is a man that works around a building as a general utility man, does all kinds of menial labor.

Q. Does he usually furnish any of his own tools?

A. He does not. [86]

Q. Where a firm of contractors was engaged in the construction of a four-story brick building, in Boise, Idaho, in July, 1910, and they had in their employ a man that had been working for them about six days, a machinist by trade, who was engaged during those six days in moving steel I-beams, and shoveling dirt, and wheeling concrete, handing brick, and doing most everything there was to do around the building, what would you say that man would be classified as?

Mr. FRASER.—I object as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness.

The COURT.—Sustained.

Mr. MARTIN.—That is all.

Cross-examination.

(By Mr. FRASER.)

Q. Mr. Paradise, in the erection of buildings such as he stated, a four-story building in this city, do they employ steelmen, or structural steelmen?

A. Structural steelmen.

Q. You don't know of such a thing as a steelman being employed in that particular trade?

A. No, I do not.

(Testimony of O. W. Allen.)

Mr. FRASER.—That is all.

Mr. MARTIN.—That is all. [87]

[Testimony of O. W. Allen, for Defendant.]

O. W. ALLEN, a witness duly called and sworn in behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. What is your name? A. O. W. Allen.

Q. Where do you reside? A. Boise.

Q. What is your business?

A. General contractor.

Q. How long have you been a general contractor, Mr. Allen?

A. About four years, or four and a half.

Q. You are chiefly engaged in the construction of buildings and houses?

A. Residence work almost wholly.

Q. Are you also acquainted with the construction of buildings where steel has been or is used in the construction?

A. It is seldom I have to do with that, only in a very light form, unless it be in the case of some brick veneer or something like that.

Q. During your experience as a contractor, do you know what the generally accepted definition of the term common laborer and steelman is?

Mr. FRASER.—I object to it as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness, and the witness hasn't shown himself qualified to answer.

(Testimony of O. W. Allen.)

The COURT.—He is asking whether he knows. You may answer. Do you know what those terms mean?

A. I don't know what the terms mean, no, steelman, [88] from the fact that I don't have anything to do with that line, don't figure in that line.

Q. Do you know what a common laborer is?

A. I know what I consider a common laborer, yes, sir.

Q. What is a common laborer?

A. Well, sir, a common laborer is—for me—I would expect him to do whatever I told him, in any line of work, I wouldn't expect him to furnish tools. I would expect him to do whatever I told him.

Q. Is that one of the marks of a common laborer, that he will do almost everything there is to do around a building?

A. Well, I would consider it so, yes, if a man was working for me.

Mr. MARTIN.—That is all.

Mr. FRASER.—That is all.

The COURT.—Let me ask you one question. Suppose you told a common laborer to plaster, would you expect him to do it?

A. I wouldn't expect him to do anything he couldn't do, no.

Q. Suppose he could do it.

A. Well, take my craftsmen, my carpenters, for instance, I quite frequently have them help in the concrete work.

Q. Well, do you call them common laborers be-

(Testimony of O. W. Allen.)

cause they help in that work?

A. No, I don't.

Q. I want to get at just what you mean by saying that you would expect him to do anything you asked him to do.

A. In the helper line. I would expect him to help the carpenters, or work on the mixing board, or concrete, or grade a lawn, or anything I asked him to. [89]

Q. You would expect him to do any unskilled labor? A. That's the idea.

Mr. MARTIN.—We have one more witness along the same line, and that will be our case.

The COURT.—There is one matter that I am a little in doubt about, and I will ask you now,—whether or not Mr. Lee testified that in paying the premiums upon the policy they were paid upon the basis of the inclusion of Irvin's wages, not wages paid to steelmen?

Mr. FRASER.—Yes, he so testified; at least that is my recollection of his testimony.

The COURT.—Well, I want to be sure, as to whether or not that is the case. Mr. Martin afterwards asked him some question as to his personal knowledge, and it turned out that some things he testified to were hearsay. The point may become of considerable importance, in view of the course the testimony is taking.

Mr. MARTIN.—I objected about that time to anything about the payment, on the ground that it was not the best evidence, that the payrolls would be the

(Testimony of D. A. Dean.)

best evidence as to how those men were classified on there, and how they were paid for.

An adjournment was thereupon taken until 10 A. M., Monday, Feb. 17, 1913. [90]

At 10 A. M., Monday, Feb. 17, 1913, the Court resumed its session, pursuant to adjournment, all parties being present.

[Testimony of D. A. Dean, for Defendant.]

D. A. DEAN, a witness duly called and sworn in behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. You may state your name, Mr. Dean.

A. D. A. Dean.

Q. And your residence? A. Boise.

Q. And your occupation or business?

A. Superintendent of construction.

Q. For what company are you superintendent of construction? A. James Stewart & Company.

Q. They are in the general building construction business? A. They are.

Q. How long have you been engaged as the building contractor? A. Six or seven years.

Q. For what firm or firms have you worked during that time?

A. Hoover & Mason of Chicago, the American Bridge Company, and several smaller firms.

Q. And in what localities have you been in that business?

A. Principally in Chicago and Denver and Omaha.

(Testimony of D. A. Dean.)

Q. How long have you been engaged in that business in this locality?

A. Well, I was in Denver in about 1909. I have been west since then.

Q. And in Boise, how long have you been engaged in the general contracting business? [91]

A. About two years in Boise.

Q. Do you know what the term "steelman" or "steelmen," in the building trade or business, signifies, as a class of workmen?

A. Structural steel erectors.

Q. What are the marks which distinguish a steelman, as applied to a class of workmen?

A. A man that is familiar with the use of the tools in connection with the erection and fabrication of structural steel.

Q. And I suppose that in practically every job that you have undertaken as a building contractor you have also used the classification of laborers known as common laborers? A. We have.

Q. What does the term common laborer signify?

A. Well, a man that can run a wheelbarrow, a shovel and pick,—some of the rougher tools of the building trades.

Mr. MARTIN.—That is all.

Cross-examination.

(By Mr. FRASER.)

Q. Supposing a steelman was to run the wheelbarrow and shovel dirt for a while, what would you classify him?

A. I don't believe you could get one to do it.

(Testimony of D. A. Dean.)

Q. But if they did do it. They could do it if they wanted to? A. I think so.

Q. There wouldn't be any reason why they wouldn't, except that they don't care to do that kind of work, is that what you mean? A. Yes.

Mr. FRASER.—That is all. [92]

Mr. MARTIN.—The defendant rests.

[Testimony of C. H. Lee, for Plaintiffs (Recalled in Rebuttal).]

C. H. LEE, recalled as a witness for the plaintiffs in rebuttal, testified as follows, on

Direct Examination.

(By Mr. FRASER.)

Q. Calling your attention to Exhibit No. 7, just state what that is, generally. Without reading it, just state generally what it is. You can go over it afterwards.

A. It is a letter on the Pennsylvania Casualty Company's heading, addressed to A. S. Whiteway & Co., Boise, Idaho, speaking in general terms of this Mr. Irvin, when the accident occurred.

Q. Did you receive that letter through the mails?

A. Yes, sir.

Q. It came into your possession in the regular course of the mails? A. Yes, sir.

Q. You got it through the postoffice?

A. Through the postoffice, yes, sir.

Mr. FRASER.—I offer it in evidence.

Mr. MARTIN.—If the Court please, we will object to the introduction or the admission of Plaintiff's Exhibit No. 7 in evidence, for the reason that

(Testimony of C. H. Lee.)

it is in the nature of a compromise settlement, as shown on the last page of that exhibit, and it is incompetent, irrelevant and immaterial, and improper rebuttal.

The COURT.—Sustained. [93]

Mr. FRASER.—If the Court please, before the objection is sustained, the object of introducing this letter isn't as far as the compromise is concerned, but in the answer in this case they allege that they were misled, and that statements had always been made to them that this man was a common laborer, and they based their defense on the ground that they were to a certain extent misled by the fact that this man was a common laborer; and that letter goes to show that they made several—they introduced in evidence here, as a part of their case, a statement signed by A. S. Whiteway & Company, in which the words "common laborer" are used, as well as other things; and that is just for the purpose of showing and answering that part of the defense, that they were misled by the fact that they believed him to be a common laborer, and therefore took no action at all, and we just desire to show that that part of it wasn't true,—not introducing it as a compromise, but just for the purpose of showing that they had mentioned several specific reasons there for their declining to proceed further in the settlement, and the fact that he was a common laborer, or that he was represented as such, is not mentioned in that document.

The COURT.—What have you to say as to that, Mr. Martin? Perhaps it is admissible for that very limited purpose.

(Testimony of C. H. Lee.)

Mr. FRASER.—That is all we desire.

Mr. MARTIN.—If the Court please, that letter there does not show that anything was said concerning [94] the matter whether or not this man was a common laborer, but that could not be brought out by the company at the time that this case in the District Court was pending, for the reason that it might be that the facts would turn out that the man was a steelman, that is, it might turn out that what he was doing would be proven in such a way in the District Court that the fact would be that this man was a steelman, and would actually be covered by the policy, in which case it would be the duty of the Pennsylvania Casualty Company to come in and defend, but where they have set up all during this first case, or when they pleaded in the District Court, that this man was a common laborer, and have also by their reports said that this man was a common laborer, then we say we were misled, if the fact turned out as they pleaded it in their complaint in the case in this court, and at the time that letter was written the matter stood then as if this man was a common laborer.

Mr. FRASER.—I desire to call your attention to the specific allegations in your answer.

The COURT.—I think I shall let it go in for that purpose. As I understand, this letter was written at least after this notice was given of the injury?

Mr. FRASER.—Yes, the dates show that.

The COURT.—You introduced the report?

Mr. FRASER.—Yes.

The COURT.—For the purpose of showing that it

(Testimony of C. H. Lee.)

was their claim that he was a common laborer? [95]

Mr. FRASER.—And that they were misled by that. In other words, if the Court please—

The COURT.—I think I understand the situation.

Mr. MARTIN.—That letter also reserves the right to make that defense.

Mr. FRASER.—It doesn't say anything about that particular—

Mr. MARTIN.—But reserves all rights.

The COURT.—Yes.

Mr. MARTIN.—And it seems that the purpose of that letter, your Honor, was a compromise settlement. That seems to be the gist of that letter.

The COURT.—Well, it will be considered (there is no danger of prejudice, since it is not before the jury) only so far as it may bear upon that question. It may be that in the light of all the record it shouldn't be given any weight at all, that is, any considerable weight.

(Said Plaintiff's Exhibit No. 7 was thereupon marked "Admitted.")

Q. Mr. Lee, you heard the testimony of Mr. Irvin as to the different duties that he performed for you during and around the erection of this building in controversy? A. Yes, sir.

Q. Was there any difference in the classification of his work during time, for instance, that he was wheeling dirt, or carrying bricks, or doing these other matters which he testified he did at several times—how was he classified during that period of

(Testimony of C. H. Lee.)

time while he was working on those particular things?

A. He was classified as working on steel.

Q. Was he paid as a steelman during that time?
[96]

A. He was paid \$2.50 a day, the same as all the other men that worked on steel; nobody got more than \$2.50 a day for working on steel; they were all in that classification, and all their wages went into the steel classification, on which we paid six and a half per cent. One or two got \$3.00 a day, but the most of them got only \$2.50.

Q. Then all the wages he received during the time he was working there, whether it was wheeling brick or mortar, or these other matters which he said he did, was included in the estimated premium which you paid the company, under the steel classification?

Mr. MARTIN.—That is objected to as leading.

A. Every dollar.

The COURT.—Well, it is, yes. He has answered. I shall let it stand. It was a leading question. You can cross-examine him and see what he knows about it.

Mr. FRASER.—That is all I desire to ask Mr. Lee at the present time.

Cross-examination.

(By Mr. MARTIN.)

Q. What did Mr. Butler get, Mr. Lee?

A. Mr. Butler got \$6.00 a day.

Q. He was working on the steel, was he not?

A. No; he was general foreman. He don't work

(Testimony of C. H. Lee.)

on anything particularly; he was general foreman.

Q. Wasn't he working on the steel at the time Mr. Irvin was hurt?

A. No; he is the general foreman, has charge of all the men. He isn't supposed to work on anything particularly at all; he is foreman. [97]

Q. Will you say that Mr. Butler was not working upon the steel when Mr. Irvin was hurt?

A. He never worked on the steel that I know of.

Q. You were not present when Mr. Irvin was hurt? A. No, I wasn't present.

Q. How do you know Mr. Butler was not working on the steel?

A. On general principles, because he never does work on those things.

Q. And that is the only way you know?

A. Yes.

Q. Who kept the pay-roll? A. Mr. Butler.

Q. At the time Mr. Irving was injured?

A. Mr. Butler keeps the time all the time when he is on the job as foreman, yes, sir.

Mr. MARTIN.—That is all.

Redirect Examination.

(By Mr. FRASER.)

Q. You paid the men, did you, their wages, on the time that Mr. Butler kept and turned in to you?

A. Yes, sir, when I was present.

Q. Well, your company did?

A. Yes, our company always does. When I wasn't there, Mr. Whiteway officiated.

(Testimony of C. H. Lee.)

Mr. FRASER.—That is all. I presume, Mr. Martin, that all these documents offered on both sides can be considered as read by the court instead of taking the time to read them at the present time.

Mr. MARTIN.—Yes. [98]

(A certain document was thereupon marked Plaintiff's Exhibit No. 8.)

Mr. FRASER.—I desire to offer that in evidence.

Mr. MARTIN.—The defendant objects to the introduction of Plaintiff's Exhibit No. 8, on the ground that it is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any of the issues in the case.

(Handing exhibit to Judge.)

Mr. FRASER.—If the Court please, in answer to that I desire to say—

The COURT.—What is the third cause of action?

Mr. FRASER.—The third cause of action is the common-law cause of action. It is set up in their answer that one ground of the defense—

The COURT.—I understand your position. The objection is overruled. That is, you put this in to meet the defense that notice—

Mr. FRASER.—That notice was accepted, and that notice applies only to the employer's liability statute. That is all.

Mr. MARTIN.—That is all.

(Said Plaintiff's Exhibit No. 8 was thereupon marked "Admitted.")

The COURT.—You mean you rest?

Mr. FRASER.—Yes.

(Testimony of C. H. Lee.)

The COURT.—I will hear you briefly.

Thereupon, and after argument by counsel the Court orally discussed the evidence and announced the findings of fact in favor of the plaintiff, reserving for further consideration the question of the right of the plaintiffs to recover the attorneys' fees claimed and later announced its conclusions upon that question. [99]

COURT.—I have concluded that under the following provision of the policy:

“E. No action shall lie against the Company to recover any loss under paragraph one of this policy unless it shall be brought by the assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement unless brought by the assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety (90) days after the right of action accrues as herein provided.”

I can allow only attorney's fees that have been actually paid, the language being that “No such action shall lie to recover under any other agreement unless brought by the assured himself to recover money actually expended by him.”

(The exhibits hereinbefore referred to are hereunto annexed.) [100]

Plaintiffs' Exhibit No. 2.

Boise, Idaho, Aug. 13, 1911. No. 753

THE BANK OF IDAHO.

Pay to the order of Bradley Sheppard, Agent,
\$34.80 Thirty four & 80/100 Dollars.

Balance on Policy 2753—Dated July 1, 1910.

WHITE-LEE CONSTRUCTION CO.

Per C. H. LEE.

Endorsement: No. 398. Plaintiff's Exhibit No. 2
—Admitted 2/15/13. C.W.M. Bradley Sheppard.

Filed Feb. 17, 1913. A. L. Richardson, Clerk
U. S. District Court.

Plaintiffs' Exhibit No. 4.

Caldwell, Idaho, Dec. 26, 1911. No. 27.

FIRST NATIONAL BANK

of Caldwell, Idaho.

Pay to Alfred A. Fraser, or order, \$5000.00 Five
thousand & 00/100 Dollars.

WHITEWAY-LEE CONSTRUCTION CO.

Per C. H. LEE.

Endorsement: No. 398. Alfred A. Fraser. Plain-
tiff's Exhibit No. 4—Admitted 2/15/13. C.W.M.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U.
S. District Court.

Plaintiffs' Exhibit No. 5.

Boise, Idaho, Dec. 26th, 1911. No. —.

PACIFIC NATIONAL BANK.

Pay to the order of Karl Paine \$5000.00 Five
Thousand no/100 Dollars.

For —.

ALFRED A. FRASER. [101]

Endorsement: No. 398. Karl Paine. Plaintiff's
Exhibit No. 5. Admitted 2/15/13. C.W.M.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U.
S. District Court. **[102]**

Plaintiffs' Exhibit No. 6.

Admitted 2/17/13. C.W.M.

THE PENNSYLVANIA CASUALTY COMPANY,

Home Office, Scranton, Pa.

Scranton, Pa.

Boise, Idaho, June 27th, 1911.

A. S. Whiteway & Co.,

Boise, Idaho.

Gentlemen:—

Your attention is called to the following conditions in your Policy of Liability Insurance # ²⁷³⁵³ ₂₇₃₅₃ viz., "The Premium is based on the entire compensation, whether for salaries, wages, piece work, overtime or allowances earned by the employees of the Assured during the period of this Policy; whenever employees are compensated in whole or in part, by store certificates, board, merchandise, credits, or any other substitute for cash, the amount of com-

compensation covered by such substitutes shall be included in the entire compensation on which the premium is based. If such entire compensation exceeds the sum set forth in the Schedule, the Assured shall immediately pay the Company the additional premium earned; if such compensation is less than the sum set forth in the Schedule, the Company will return the unearned premium when determined. . . . Any of the Company's authorized Auditors shall have the right and opportunity, whenever the Company so desires, to examine the books and records of the Assured as respects compensation earned by the employees of the assured. . . .

We therefore ask you to fill in the blanks on the reverse side exactly as indicated, and return the reports promptly. The Company needs this information in making the pay-roll adjustments and your prompt compliance with this request will be much appreciated.

Yours truly,

3123.

BRADLEY SHEPPARD.

—OVER—

Form 95 B.

(Endorsed) [103]

To the Pennsylvania Casualty Company,
Scranton, Pa.

Gentlemen:—

From June 27th, 1910, to June 27th, 1911, our total expenditures for salaries, wages and overtime, whether paid in cash or by store orders, board or otherwise, all persons in our employ covered under Policy No. 27353, were as follows:

110 *The Pennsylvania Casualty Company vs.*

Drivers and Drivers' Helpers.....	\$.....
Employees in factory, shop, etc. (inside work only)	\$.....
Employees NOT in factory or shop (outside work only)	\$.....
Piece workers	\$.....
Office Employees	\$.....
Executive Officers	\$.....
Constructing four story brick bldg. bet. 10th & 11th Sts. on Main St. Boise, Idaho, Lot 4, Block 16:.....	
Masons, bricklayers and carpenters.....	\$.....
Plasterers and painters	\$.....
Steelmen	\$.....
Electric wiring	\$.....
Sheet metal workers.....	\$.....
Total.....	\$.....

Yours truly,

(Signed) _____

Assured.

By _____

Filed Feb. 17, 1913. A. L. Richardson, Clerk U.
S. District Court.

No. 398. [104]

Plaintiffs' Exhibit No. 7.

THE PENNSYLVANIA CASUALTY COMPANY.

Home Office, Scranton, Pa.

Deposited with Insurance Commissioner of
Pennsylvania, \$250,000.

Bradley Sheppard, Agent.

Boise, Idaho, February 9, 1911.

Messrs. A. S. Whiteway & Co.,

Boise, Idaho.

Dear Sirs:—

The writer has been in Boise four days investigating the circumstances surrounding the accident to Mr. J. C. Irwin, injured while in your employ on July 25, 1910, and event in regard to Mr. Irwin's claim for damages against yourselves, subsequent to his injury.

During all my connections with Casualty Insurance I have never known of an instance in which the letter and spirit of an Employer's Liability Policy have been more flagrantly violated by the policy holder than the conditions of your policy have been violated by Mr. Whiteway.

Mr. Whiteway has persistently incited this claimant to bring suit against your firm in order to force a settlement of his claim by this Company. Mr. Whiteway procured an attorney in Boise to call upon Mr. Irwin for the purpose of this attorney being employed by Mr. Irwin to represent him in procuring satisfaction of Mr. Irwin's claim for damages.

On December 19, 1910, Mr. Whiteway accepted in

writing notice of the time, place and cause of accident served upon him by Mr. Irwin's attorney, as required by the Employer's Liability Act of 1909, and waived for yourselves all objections as to the sufficiency of the notice, in direct violation of the terms of the Employers Liability Policy issued by yourselves by the Pennsylvania [105] Casualty Company. No copy of this notice has been furnished to this company, nor has any information *be* conveyed to it by you up to the present time that any notice was received nor its nature or contents.

Mr. Whiteway's entire course of conduct in this case has been so extremely prejudicial to the rights of the Pennsylvania Casualty Company in the matter, that this company feels justified in disclaiming any and all liability on account of Mr. Irwin's claim, under its Employers Liability Policy issued to you.

The writer is informed that both Mr. Whiteway and Mr. Lee of your firm are confined to their rooms by illness, which prevents his communication of the matters herein personally.

The writer is informed that Mr. Irwin's claim against yourselves can be settled for \$1500.00. If it is your purpose to compromise this claim without suit, the Pennsylvania Casualty offers to contribute \$500.00 to any such settlement as you may make with Mr. Irwin, this being made, however, without prejudice to the rights of the Pennsylvania Casualty Company in disclaiming liability under its said policy, and with the understanding that its acceptance by yourselves constitutes a complete and full release to

said company on account of the claim of Mr. Irwin against you.

Very truly yours,
JNO. A. COLEMAN,
Adjuster.

Plaintiff's Exhibit No. 7. Admitted 2/17/13
C. W. M.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U.
S. District Court.

No. 398. [106]

Defendant's Exhibit No. 1.

Admitted 2/15/13. C. W. M.

E. L., FORM 4.

(Do not write in this space)

Accident Report No.....

Kind of Policy.....)

By WHITEWAY & CO.

Policy No.....)

Boise, Idaho.

Agent.....)

Limits.....)

Premium.....)

Date.....)

Date received.....)

INSTRUCTIONS.—in the event of an accident, however slight, to any person, whether an employee or otherwise, a full report must be made upon this blank, being careful to write with ink, and to fully answer each question, and describe the way in which the accident happened.

1. Date of Accident: July 25th, 1910. Hour: 4 P. M. — A. M.
2. Name of injured person: J. C. Irwin. Color: White.
3. Address of injured person: 517 S. 14th Street, Boise, Idaho.

114 *The Pennsylvania Casualty Company vs.*

4. Occupation: Common Laborer. Age: 29.
Weekly Wages: \$15.00.
5. Family: wife & two children. Length of time
in your service: 13 days.
6. Duties of persons injured and how long en-
gaged in said duties: Laboring work in gen-
eral, thirteen days.
7. If non-employee give place and kind of occupa-
tion: ———.
8. Did accident happen in your service or of an
independent contractor? In our service.
9. Describe place where accident occurred and
what injured person was doing: Basement of
the Tyner Building, moving steel girder on
dollie.
10. Was accident due to want of care on part of in-
jured person? If so, how? No.
11. Was injury caused by negligence of co-em-
ployee? Not that I am aware of.
12. Name appliance, machine, tool, etc., causing
accident: Caused by tipping of dollie.
13. Was it impaired, unsafe or unsuited to its
work? No.
14. Did injured person know of unsafe condition
or defect or any special danger connected
with cause of accident? No. [107]
15. Who can prove this and what instructions were
given injured person? Instructions given by
foreman, James Butler, and witnesses on back
of this sheet.
16. Who gave instructions? James Butler (fore-
man). Were such instructions and all rules

and regulations observed by injured person?
Yes.

17. When was last inspection made, by whom and what was the result?
18. Did injured person make any statement and to whom? No.
19. What did he say? ———.
20. Who was in charge of work where accident occurred? (Name and address.) James Butler (Foreman). 427 S. 10th Street, Boise, Idaho.
21. (Name, J. W. Butler. Address, 427 S. 10th Street.
(Name, John Wood. Address, 1220 Main Street.
- Witnesses: (Name, A. S. Richmond. Address, 845 Warm Springs Ave.
(Name, Fred Roton. Address, 605 Fort Street.
(Name, Ed Hanrahan. Address, Mitchell Hotel.
All of Boise, Idaho.
22. Has accident ever occurred under like circumstances at same place of machine? No.
23. Nature and extent of injuries. Leg broken three places; can't tell if foot can be saved at this time.
24. Probable length of disability: Eight to twelve months. Where taken after accident? St. Lukes Hospital.
25. Name and address of Doctor: Dr. Titus. Sonna Blk. City.

Dated at Boise, State of Idaho, 26th day of July, 1910.

A. S. WHITEWAY & CO.,

By A. S. WHITEWAY,

Signature of Person Making Report.

GIVE FULL AND DETAILED ACCOUNT OF
THE ACCIDENT IN YOUR OWN LAN-
GUAGE.

Moving steel girder on Dollie from front of base-
ment to the rear of basement, cement floor being in
place, a small hole caused the dollie to tip, and fell
on the man injured.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U.
S. District Court.

No. 398. [108]

Defendant's Exhibit No. 3 Offered.

(Not Admitted.)

(Mr. PAINE.)

Q. At this time? A. At this time, yes, sir.

Q. Were you in the employ of the defendants in
July, 1910? A. Yes, sir.

Q. What was the nature of your work?

A. Well, it consisted of moving steel and shoveling
dirt and handling brick, wheeling concrete, and most
everything that there was to do around there.

Q. What— Were you working at your trade for
them?

A. No, sir, I was working as a common laborer.

Q. Under what circumstances did you go to work
for them as a common laborer?

A. Well, I was working for the Western Glazed
Cement & Machine Company of Seattle, and on ac-

count of the strike at the shop there I was delayed; I was working as a traveling machinist, and I was delayed here in Boise for, they said a couple of weeks, I would be delayed here; and when I can't get work at my trade I work at anything I can get to do; so I thought rather than lay around I would just go to work as common laborer until I got a chance to go to work again at my trade, until the strike was off; and I went up and applied for a job of Mr. Butler, which I got.

Q. And where did you go to work?

A. On the site of the Wheeler & Motter Building, known now as the Tyner building or New Boz theater, on the north side of Main Street between Tenth and Eleventh.

Q. And on what day did you go to work?

A. On the 18th day of July, 1910.

Q. What salary did you receive as a common laborer? A. \$2.50 a day. [109]

Defendant's Exhibit No. 5.

Admitted, 2/15/13. C. W. M.

Plaintiff's Exhibit "E" for Identification.

10/5/1911, C. W. M.

Admitted in evidence, 10/6/1911. C. W. M.

To A. S. Whiteway & Company,

Boise, Idaho.

YOU ARE HEREBY NOTIFIED that July 25th, 1910, was the time and the basement of the building constructed by you on the site of the building numbered 1008-1010 West Main Street, situated on the north side of Main Street, in the City of

Boise, Idaho, and occupied by The Wheeler-Motter Company when the same was destroyed by fire, was the place of an injury received by me while in your employ in the construction of said building; and the cause of said injury was as follows: That certain of your employees, including myself, placed a heavy girder on a "dolly" under the direction of and assisted by your foreman, James W. Butler, and were in the act of conveying the girder on the "dolly" over and across the concrete floor in said basement, under the direction of and assisted by said foreman, when the "dolly" struck a defective place, viz., a hole in said floor, in such a way as to tilt and cause the girder to fall against and upon my left leg, and cut, mangle and crush the same; that the injury was caused by reason of the said defect in the condition of said floor, which floor was part of the ways and works connected with and used by you in the construction of said building, and which defect arose from or had not been discovered or remedied owing to your negligence and the negligence of your foreman, who was entrusted by you with the duty of seeing that the ways, works and machinery were in proper condition, and said injury was further caused by reason of your negligence and the negligence of your said foreman in the use made of said "dolly" and in the way it was used and in directing the placing of the girder on the "dolly" in the manner it was placed thereon, said foreman being entrusted by you with superintendence of the construction of said building, and being in the exercise of such superin-

tendence, and whose principal duty was that of superintendent.

That at the time of the injury, I was exercising due care and diligence.

J. C. IRWIN,

By KARL PAINE,

His Agent and Attorney.

Service of the foregoing notice by copy is hereby accepted this 17th day of December, 1910, by the undersigned, who was, on July 25th, 1910, and now is a member of the firm of A. S. Whiteway & Company, and I hereby waive for the firm any objections to the sufficiency of said notice, having been present in person at the time of the injury referred to in said notice, and to the sufficiency of the service thereof.

A. S. WHITEWAY.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U. S. District Court.

No. 389. [110]

Plaintiffs' Exhibit No. 8.

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties herein, that in the case of J. C. Irwin vs. A. S. Whiteway and C. H. Lee, co-partners as A. S. Whiteway & Co., which said action was tried in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, that the attorneys for the said Irwin elected to stand upon the Third Cause of action set forth in the complaint in that action and that the Court instructed the jury as follows:

“Plaintiff has elected to stand upon his third cause of action, as stated in the complaint, and you will therefore give consideration to the allegations contained in that cause of action alone, and should not consider his first and second causes of action.”

It is agreed further that the facts herein stipulated are not to be considered as evidence in this case until duly admitted over all such objections as attorneys for the defendant may desire to make except the objection that it is not the best evidence.

ALFRED A. FRASER,

Attorney for Plaintiff.

MARTIN & CAMERON,

Attorneys for Defendant.

Boise, Idaho, Jan. 31, 1913.

Plaintiff's Exhibit No. 8. Admitted 2/17/13. C. W. M.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U. S. District Court. [111]

[Motion to Vacate Judgment, etc.]

The trial of the cause was concluded on the 16th day of February, 1913, and upon the trial of the cause a stipulation was entered into between counsel for the respective parties, that all objections made and exceptions taken during the progress of the trial might be embodied in a bill of exceptions or statement on motion for a new trial, to be thereafter prepared, the same to have force and effect as if settled in a bill of exceptions upon the trial, either party to have forty days beyond the ten days allowed by the

court rule of this court within which to prepare and serve upon the opposing party such proposed bill of exceptions, the time provided for in said stipulation was further extended, by order of the Court duly made and entered April 1, 1913, for a period of thirty days additional, said last extension having been concurred in by counsel for respective parties, extending the time for preparing and serving the bill of exceptions herein to April 30th, 1913.

Upon motion of defendant, the Court allowed upon stipulation of counsel until March 21, 1913, to file motion for new trial and said motion for new trial was prepared and filed within the time allowed and due notice thereof given and upon the 1st day of April, 1913, which said motion was as follows:

The defendant petitions the above-entitled court and moves that the judgment herein rendered be vacated and a new trial awarded for the following reasons:

1. Irregularity in the proceedings of the Court and irregularity in the proceedings of the adverse party.

2. Accident and surprise which ordinary prudence could not have guarded against.

3. Newly discovered evidence material for the defendant, which defendant could not with reasonable diligence have discovered and produced at the trial.

4. Insufficiency of the evidence to justify the decision and that the decision is against law. [112]

5. Errors in law occurring at the trial.

6. That the right to have a bill of exceptions has

been lost without any fault of the defendant.

Said motion and petition for new trial shall be heard on the assignment of errors accompanying the said motion and petition and specification showing particulars in which the evidence was insufficient to justify the decision, and upon the pleadings, papers and files, the minutes of the court, and the reporter's transcript of the shorthand notes.

The defendant's specification of errors occurring at the trial was as follows accompanying said motion for new trial.

DEFENDANT SPECIFIES THE FOLLOWING ERRORS OF LAW OCCURRING AT THE TRIAL:

The Court erred in the admission of evidence offered by the plaintiff in the following instances, to wit:

1. In the testimony by C. H. Lee in permitting the witness to answer the following question: "These payments you made, \$90.10, and this further payment of \$34.80, what employees' compensation was included in these payments?" and in overruling defendant's objection thereto.

2. In permitting the witness C. H. Lee to answer the following question: "Mr. Lee, was Irwin put in your payroll then under the schedule of "Steel-man?" and in denying defendant's motion to strike the answer.

3. In rejecting portions of Exhibit No. 3 of defendant, which exhibit was a transcript of the reporter's notes of the testimony in the District Court of the Third Judicial District of the State of Idaho

in and for Ada County, in the case where Irwin brought suit against Whiteway and Lee for the personal injury alleged to have been covered by the insurance policy being sued on here, which evidence was in substance [113] as follows:

Question by Irwin's Attorney: "What was the nature of your work?"

Answer by Irwin; "Well, it consisted of moving steel, and shoveling dirt, and handling brick, wheeling concrete and doing most everything there was to do around there."

Question: Were you working at your trade for them?

Answer: No, sir; I was working as a common laborer.

Question: What salary did you receive as a common laborer?

Answer: \$2.50 per day.

4. In rejecting a certain contract marked Exhibit 4, which was a liability policy issued by the defendant company to Fred G. Mock, previous to the time the policy being sued on in this case at bar was issued, and in the schedule of which policy, besides the other laborers classified as carpenters, bricklayers, etc., the classification of laborers known as common laborers had been set forth and the rate was set forth as \$1.50 per \$100 of estimated compensation.

5. In rejecting the following question to be asked the witness Irwin (who was the person injured and the person plaintiff claimed to be covered by the policy sued on here): Q. "I ask you this question, if you did not answer to this question, 'Were you working

at your trade for them?' and your answer was: 'No, sir, I was working as a common laborer?' "

6. In refusing the following question to be asked the witness W. L. Hammond: "Was this man that I have described herein this question as moving steel, shoveling dirt, handling brick, wheeling concrete and doing most everything there was to do around the building, whose wages were \$2.50 per day, a steel-man?"

7. In refusing the question set forth in paragraph No. 6 immediately above this paragraph to be asked the witness W. L. Hammond with the following addition: "Also taking into consideration the fact as shown here also in the evidence that this man was a machinist by trade." [114]

8. In refusing to allow the following question to be asked the witness Frank H. Paradise: "Where a firm of contractors was engaged in the construction of a four-story brick building, in Boise, Idaho, in July, 1910, and they had in their employ a man that had been working for them about six days, a machinist by trade, who was engaged during the six days in moving steel I-beams and shoveling dirt, and wheeling dirt, and wheeling concrete, handling brick, and doing almost everything there was to do around the building, what would you say that man would be classified as?"

9. In permitting the admission in evidence of Plaintiff's exhibit No. 7 over the objection and exception of defendant.

10. In permitting the admission in evidence of Plaintiff's Exhibit No. 8, over the objection and ex-

ception of defendant.

The defendant submits that the evidence is insufficient to sustain the decision rendered herein in the following particulars:

1. The evidence does not show that the person injured came within the schedule in the insurance policy or contract, which schedule set forth the classes of workmen covered by the policy.

2. The evidence does show that J. C. Irwin, the person injured, was a common laborer and that he was not covered by the policy.

3. The evidence does not show that the man who was injured was a steelman or belonged to any other class of workmen covered by the policy.

4. The evidence does not show that the man who was injured had his entire compensation included within the estimated compensation of steelmen, which amount was \$50.00.

5. The evidence is insufficient to justify the decision in that it shows that the plaintiff broke its contract by getting an attorney for Irwin, signing a waiver of a statutory notice for Irwin's attorney and aiding Irwin's attorney at divers times and being in the office of [115] Irwin's attorney before the trial of Irwin's case against the plaintiff here, when the contract provided that the plaintiff should have rendered to the defendant all assistance within plaintiff's power.

After consideration of said motion the Court overruled the same on the 1st day of April, 1913, to which the defendant duly excepted.

TO ALFRED A. FRAZER, ESQ., Attorney for the

plaintiffs in the above-entitled action:

The foregoing is the bill of exceptions proposed by counsel for the defendant in the above-entitled action.

April 21st, 1913.

MARTIN & CAMERON,
Attorneys for the Defendant.

I hereby accept service of the foregoing proposed bill of exceptions, by copy this 21st day of April, 1913.

ALFRED A. FRASER,
Attorney for Plaintiffs.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing bill of exceptions presented the 25th day of April, 1913, is hereby settled and allowed this 3d day of July, 1913.

FRANK S. DIETRICH,
District Judge.

I hereby waive notice of time of the settlement of above Bill of Exceptions.

June 25, 1913.

ALFRED A. FRASER,
Atty. for Plaintiffs.

Filed April 25, 1913. A. L. Richardson, Clerk.

Re-filed July 3, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

AT LAW.

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & COMPANY,
Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COM-
PANY,
Defendant.

Petition for Writ of Error.

Now comes THE PENNSYLVANIA CASUALTY COMPANY, defendant herein, and says that on or about the 19th day of February, 1913, this Court entered judgment herein in favor of the plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and that an order may be made fixing the amount of security which said defendant shall give and furnish upon the issuance of said writ of error, and that upon the giving of said security all further proceedings of this

Court be suspended and stayed until the determination of said writ.

MARTIN & CAMERON,
Attorneys for the Defendant.

[Endorsed]: Filed July 11, 1913. A. L. Richardson, Clerk. [117]

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COM-
PANY,
Defendant.

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error makes the following assignment of errors, which it avers occurred upon the trial of this cause, to wit:

1. The Court erred, in the testimony of C. H. Lee in permitting the witness Lee to answer the following question: "These payments you made, \$90.10, and this further payment of \$34.80, what employees' compensation was included in these payments?" and in overruling defendant's objection thereto.

2. In permitting the witness C. H. Lee to answer the question, "Mr. Lee, was Irwin in your payroll then under the schedule of 'steelmen' "? and in denying defendant's motion to strike the answer.

3. In rejecting page 4 of Defendant's Exhibit Number 3, which exhibit was a transcript of the reporter's notes of the testimony in the District Court of the Third Judicial District of the State of Idaho in and for Ada County, in the case where Irwin brought suit against Whiteway and Lee for the personal injury alleged to have been covered by the insurance policy sued on here, which page 4 of said Exhibit 3 was in substance as follows: [118]

Question by Irwin's attorney: "What was the nature of your work?"

Answer by Irwin: Well, it consisted of moving steel, and shoveling dirt, and handling brick, wheeling concrete and doing most everything there was to do around there."

Question: Were you working at your trade for them?

Answer: No, sir; I was working as a common laborer.

Question: What salary did you receive as a common laborer?

Answer: \$2.50 per day.

4. In rejecting a certain contract marked Exhibit 4, which was a liability policy issued by the defendant to Fred G. Mock, previous to the time the policy being sued on in this case at bar was issued, and in the schedule of which policy, besides the other laborers classified as carpenters, bricklayers, etc., the classification of laborers known as common laborers had been set forth and the rate was set forth as \$1.50 per \$100 of estimated compensation.

5. In rejecting the following question asked the witness Irwin, (who was the injured person and the person plaintiff claimed to be covered by the policy sued on here) : Q. I ask you this question, if you did not answer to this question, "Were you working at your trade for them?" and if your answer was: "No, sir, I was working as a common laborer."

6. In refusing to allow the following question to be asked the expert witness Hammond, "Was this man, that I have described here, in this question, as moving steel, shovelling dirt, handling brick, wheeling concrete and doing most everything there was to do around there, the building, whose wages were \$2.50 per day, a steelman?"

7. In refusing the question set forth in paragraph number six immediately above this paragraph to be asked the said witness [119] Hammond with the following addition: "Also taking into consideration the fact as shown here also in evidence that this man was a machinist by trade."

8. In refusing to allow the following question to be asked the witness Frank H. Paradise: "Where a firm of contractors was engaged in the construction of a four-story brick building, in Boise, Idaho, in July, 1910, and they had in their employ a man that had been working for them about six days, a machinist by trade, who was engaged during the six days in moving steel I-beams and shovelling dirt, and wheeling dirt, and wheeling concrete, handling brick and doing almost everything there was to do around the building, what would you say that man would be classified as?"

9. In permitting the admission in evidence of plaintiff's Exhibit No. 7 over the objection and exception of defendant.

10. In permitting the admission in evidence of Plaintiff's Exhibit Number Eight, over the objection and exception of defendant.

11. In refusing to grant defendant's motion for a new trial.

WHEREFORE, the defendant prays that the judgment and the findings rendered in the trial court in favor of the plaintiff be set aside and reviewed and that the defendant be granted a new trial.

MARTIN & CAMERON,
Attorneys for the Defendant.

[Endorsed]: Filed July 11, 1913. A. L. Richardson, Clerk. [120]

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COM-
PANY,
Defendant.

Order Allowing Writ of Error.

This 11th day of July, 1913, came the defendant and filed herein and presented to this Court its petition praying for the allowance of a writ of error intended to be urged by said defendant, and said de-

132 *The Pennsylvania Casualty Company vs.*

fendant having filed herein an assignment of errors, as provided by law, in consideration whereof, it is ordered that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment hereinbefore, to wit, on the 19th day of February, 1913, made and entered in favor of the plaintiff herein and against the defendant herein, be and the same is hereby allowed, and that a complete transcript of the record forthwith be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at the City of San Francisco, State of California.

Dated at Boise, Idaho, this 11th day of July, 1913.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed July 11, 1913. A. L. Richardson, Clerk. [121]

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

A. S. WHITEWAY and C. H. LEE, Copartners as
A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COM-
PANY,

Defendant.

Order for Filing Bond.

The defendant having this day filed its petition for a writ of error from the judgment thereon made and entered herein, to the United States Circuit

Court of Appeals, in and for the Ninth Circuit, together with its assignment of errors within due time, and also praying that an order may be made fixing the amount of security which said defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Judicial District, and said petition having this day been duly allowed,

ORDERED, that upon the defendant filing with the clerk of this court a good and sufficient bond in the sum of \$7,000.00 to the effect that if the said defendant and plaintiffs in error shall prosecute the said writ of error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation is to be void, else to remain in full force and [122] virtue, the said bond to be approved by the Court, that all further proceedings in this court be, and they are hereby, suspended and stayed until the determination of this writ of error by the United States Circuit Court of Appeals.

Dated July 11th, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 11, 1913. A. L. Richardson, Clerk. [123]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

A. S. WHITEWAY and C. H. LEE, Copartners, as
A. S. WHITEWAY & CO.,

Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

**Order Allowing Withdrawal of Certain Original
Exhibits.**

ORDERED that original exhibit of plaintiff, number one, and original exhibit of defendant, number four, on the trial of this cause and not set forth at length in the bill of exceptions herein, and referred to in said bill of exceptions, be allowed to be withdrawn from the files for the purpose of being transmitted to the United States Court of Appeals for the Ninth Circuit as part of the record upon writ of error to the said United States Circuit Court of Appeals, in this cause.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed July 11, 1913. A. L. Richardson,
Clerk. [124]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

A. S. WHITEWAY and C. H. LEE, Copartners, as
A. S. WHITEWAY & COMPANY,

Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Bond on Appeal on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
that we, THE PENNSYLVANIA CASUALTY
COMPANY, a corporation, as principal, and THE
TITLE GUARANTY & SURETY COMPANY OF
SCRANTON, PENNSYLVANIA, as surety, are
held and firmly bound unto A. S. Whiteway and C.
H. Lee, copartners, as A. S. Whiteway & Company,
in the full and just sum of \$7,000.00, to be paid to
the said A. S. Whiteway and C. H. Lee, copartners,
as A. S. Whiteway & Company, its certain attorney
or representatives; to which payment well and truly
to be made, we bind ourselves, our heirs, executors
and administrators, jointly and severally by these
presents. Sealed with our seals and dated this 18th
day of July, 1913.

WHEREAS, in the above-entitled court between
the above-named parties a judgment was rendered
against the defendant, and the defendant having ob-
tained from the said court a writ of error to reverse
the judgment in the aforesaid suit, and a citation
directed to the said plaintiff citing and admonishing

it to appear and be at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco on the 11th day of [125] August, 1913, next.

Now, the condition of the above obligation is such that if the said defendant shall prosecute the said writ of error to effect and answer all damages and costs if they fail to make their said plea good, then the above obligation to be void; else to remain in full force and effect.

THE PENNSYLVANIA CASUALTY COMPANY,

By MARTIN & CAMERON,

Its Attorneys.

TITLE GUARANTY & SURETY COMPANY OF SCRANTON, PENNSYLVANIA.

[Seal]

By FRANK B. KINYON,

Its Attorney in Fact.

Approved July 11, 1913.

DIETRICH,

Judge.

[Endorsed]: Filed July 18, 1913. A. L. Richardson, Clerk. [126]

In the District Court of the United States for the District of Idaho, Southern Division.

A. S. WHITEWAY & C. H. LEE, Copartners, as

A. S. WHITEWAY & COMPANY,

Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,

Defendant.

Writ of Error.

From the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Idaho, Southern Division.

United States of America,—ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the District of Idaho, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between A. S. Whiteway and C. H. Lee, copartners, as A. S. Whiteway & Company, plaintiff, against The Pennsylvania Casualty Company, defendant, a manifest error hath happened, to the great damage of the said The Pennsylvania Casualty Company, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, on the 11th day of August, 1913, in the said Circuit Court of Appeals, to be then and there held, that [127] the records and proceedings aforesaid being inspected, the said Circuit Court of Ap-

peals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 11th day of July, 1913, and in the year of the Independence of the United States of America, the one hundred and thirty-eighth.

Allowed by

FRANK S. DIETRICH,

United States District Judge.

[Seal]

Attest: A. L. RICHARDSON,

Clerk of the District Court of the United States,
District of Idaho.

Service of the foregoing writ of error admitted this 11th day of July, 1913.

ALFRED A. FRASER,

Per R. R. W.

Attorney for Plaintiff. [128]

[Endorsed]: #398. In the District Court of the United States for the District of Idaho, Southern Division. A. S. Whiteway et al., Plaintiffs, vs. The Pennsylvania Casualty Co., Defendant. Writ of Error. Filed July 18, 1913. A. L. Richardson, Clerk. [129]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

A. S. WHITEWAY & C. H. LEE, Copartners, as
A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Citation.

The United States of America,—ss.

To A. S. Whiteway and C. H. Lee, Copartners, as
A. S. Whiteway & Company, and to A. A.
Fraser, Attorney for the Plaintiff, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California, on the 11th day of August, 1913, pursuant to the writ of error filed in the office of the Clerk of the District Court of the United States, for the District of Idaho, Southern Division, wherein the parties, A. S. Whiteway and C. H. Lee, copartners as A. S. Whiteway & Company, are plaintiffs, and The Pennsylvania Casualty Company, is defendant and plaintiff in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to parties in that behalf.

FRANK S. DIETRICH,

Judge.

Service of the within and foregoing citation accepted this 11th day of July, 1913.

ALFRED A. FRASER,

Per R. R. W.

Attorney for Defendant in Error. [130]

[Endorsed]: No. 398. In the District Court of the United States for the District of Idaho, Southern Division. A. S. Whiteway et al., Plaintiff, vs. The Pennsylvania Casualty Company, Defendant. Citation. Filed July 18, 1913. A. L. Richardson, Clerk. [131]

In the District Court of the United States for the District of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners, as
A. S. WHITEWAY & COMPANY,

Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

**Order [Directing Transmission of Transcript of
Record, etc., to Appellate Court].**

IT IS ORDERED by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same be transmitted accordingly.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [132]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
District of Idaho, Southern Division.*

A. S. WHITEWAY and C. H. LEE, Copartners, as
A. S. WHITEWAY and COMPANY,
Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

I, A. L. Richardson, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 133, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record and return to the annexed writ of error.

I further certify that the cost of the record herein amounts to the sum of \$70.00 and that the same has been paid by the appellant.

Witness my hand and the seal of said District Court, affixed at Boise, Idaho, this 23d day of July, 1913.

[Seal]

A. L. RICHARDSON,
Clerk. [133]

[Endorsed]: No. 2297. United States Circuit Court of Appeals for the Ninth Circuit. The Pennsylvania Casualty Company, Plaintiff in Error, vs. A. S. Whiteway and C. H. Lee, Copartners, as A. S. Whiteway & Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Southern Division.

Received and filed August 7, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

Plaintiff's Exhibit 1

146

Policy of Insurance of Pennsylvania Casualty Co., Issued to A. S. Whiteway & Co.

FORM NO 426 ED 6-09

No. 27353

THE PENNSYLVANIA Casualty Company

COAT-OF-ARMS—STATE OF PENNSYLVANIA

OF SCRANTON, PENNSYLVANIA

(HEREINAFTER CALLED THE COMPANY)

Does Hereby Agree with

- - - - - A. S. Whiteway & Company - - - - -

(HEREINAFTER CALLED THE ASSURED)

In Consideration of the payment of the premium as hereinafter provided and the Declarations on page three of this policy:

- INDEMNITY** 1. To Indemnify the Assured, subject to the limits expressed in Statement Four of the Declarations against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries, including death at any time resulting from such injuries accidentally sustained during the period of this Policy by reason of the business operations described and conducted at the locations named in said Declarations by all employees of the Assured as hereinafter provided.
- SUITS COSTS & EXPENSES** 2. To Defend in the name and on behalf of the Assured any suits, even if groundless, which may at any time be brought on account of such injuries and to PAY all costs taxed against the Assured under any legal proceedings defended by the Company, all expenses incurred in the investigation of such injuries and in the negotiations for settlement, all expense of the contest of claims arising therefrom, and all interest on such part of any judgment as shall not be in excess of the limits of the Company's liability as hereinafter expressed.
- SURGICAL RELIEF** 3. To Reimburse the Assured for all expenses incurred by him for such immediate surgical relief as shall be imperative at the time any such injury is sustained.
- PERSONS & OPERATIONS COVERED** 4. This Policy shall cover as above provided: (1) All such injuries sustained at the locations described in the Declarations by all employees of the Assured whose entire compensation is included in the estimated compensation as shown in Statement Three of the Declarations, including also drivers employed by the Assured who are specifically enumerated in any concurrent Teams policy carried by the Assured in this Company while such drivers are engaged in any duties other than those of a driver. (2) All such injuries sustained by such employees caused by any person wholly engaged in clerical or office duties, the Assured himself if the Assured is an individual, any member of the firm if the Assured be a firm, the President, Vice-President, Secretary and Treasurer if the Assured be a Corporation, but injuries to the persons described in this clause shall not be covered unless the compensation paid to such persons is included in the estimated compensation. (3) All such injuries sustained by drivers, and their helpers, lumpers, stevedores, loaders, material handlers, time-keepers, pay-clerks and messengers whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the service of the Assured in connection with the business operations described in the Declarations. This policy shall not cover injuries sustained by any person or persons except as above provided nor any injuries occasioned by reason of the failure of the Assured to observe any local ordinance of which he has knowledge, nor any injuries sustained or caused by any person employed by the Assured in violation of law as to age or under the age of fourteen years if there is no legal age limit, or by any contract convict laborer, nor liability of others assumed by the Assured under any contract or agreement, oral or written.

These Agreements are subject to the following conditions:

- PREMIUM** A. The premium is based upon the entire compensation earned during the policy period by all employees of the Assured, not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this Policy. The premium is subject to adjustment at the termination of the policy or at the end of each period of one year if the policy be written for a longer term, when the Assured shall furnish to the Company for the purpose of said adjustment a written Declaration of the exact amount of compensation earned by the said employees during the said period. If the earned premium computed thereon at the rate or rates specified in Statement Three exceeds the estimated premium paid, or such portion of it as represents the premium for the annual period, the Assured shall immediately pay the additional amount to the Company; if less, the Company shall return to the Assured the unearned premium, but, except in the event of cancellation by the Company or by the Assured when the Assured is retiring from business, the Company shall receive or retain the minimum premium provided in Statement Twelve. The word "Compensation" used in this paragraph shall include all salaries, wages and other sums paid for regular time, overtime, piecework or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash.
- CANCELLATION** B. This policy may be cancelled by the Company at any time by written notice served on or sent by registered letter to the Assured at the address given herein, stating when the cancellation shall be effective. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata when determined. If cancelled by the Assured unless the Assured has retired from business, the Company shall receive or retain the customary short-rate premium. (In either case the earned premium shall be computed on the compensation for the year as indicated by the actual compensation earned by the employees of the Assured during the time the policy shall have been in force.) In any case the Company shall receive or retain the minimum earned premium stated in Statement Twelve. The Company's check mailed to the address of the Assured as given herein shall be a sufficient tender, but no return premium shall be payable until a statement of the actual compensation earned by the employees of the Assured during the period the policy was in force shall have been furnished to the Company by the Assured.
- INSPECTION** C. The Company shall be permitted at all reasonable times during the policy period to inspect the plant, works, machinery, and appliances covered by this policy and to examine the Assured's books at any time during the policy period or any extension thereof, or within one year after its final expiration so far as they relate to the compensation earned by his employees while the policy was in force.

- NOTICE** D. Upon the occurrence of an accident the Assured shall give immediate written notice thereof to the Company, or its duly authorized agent, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If thereafter any suit is brought against the Assured he shall immediately forward the Company every summons or other process served upon him. The Assured when requested by the Company shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals, and shall at all times render to the Company all co-operation and assistance in his power. He shall not voluntarily assume any liability, except as provided in Paragraph Three of the insuring clause, settle any claims or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceeding without the consent of the Company previously given in writing.
- ASSURED'S RIGHT OF RECOVERY** E. No action shall lie against the Company to recover for any loss under Paragraph One of this Policy unless it shall be brought by the Assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety (90) days after the right of action accrues as herein provided.
- SPECIAL STATUTES** F. Any limitations or requirement of this Policy as respects time for notice of accident or for any legal proceeding conflicting with the law of the State in which the policy is issued shall be construed as amended to conform with such law.
- ASSIGNMENT** G. No assignment of interest under this Policy shall bind the Company unless the consent of the Company shall be endorsed hereon.
- CONCURRENT INSURANCE** H. If the Assured shall carry a policy of another insurer, whether valid or not, against a loss covered by this Policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of his insurance.
- SUBROGATION** I. In the case of payment of loss under this Policy, the Company shall be subrogated to all rights of the Assured against any person or corporation, as respects such loss, to the amount of such payment, and the Assured shall execute all papers required and shall co-operate with the Company to secure to the Company such rights.
- WAIVERS AND ALTERATIONS** J. No condition or provision of this Policy shall be waived or altered except by endorsement attached hereto signed by the President, Vice-President, Secretary or Assistant Secretary of the Company; nor shall any notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. The personal pronoun herein used to refer to the Assured shall apply regardless of number or gender.
- WARRANTIES** K. Statements of the Declarations on page three of this Policy, numbers One to Twelve inclusive are warranted by the Assured to be true and correct except such as are declared to be matters of estimate only. This Policy is issued in consideration of and upon the faith of such warranties, the provisions of the policy respecting its premium and the payment of the premium as expressed in the Declarations.

In Witness Whereof, THE PENNSYLVANIA CASUALTY COMPANY of Scranton, Pa., has caused this policy to be signed by its President and Secretary at Scranton, Pa., and countersigned by a duly authorized agent of the Company.

F. H. Kingsbury, Secretary.

Thomas E. Jones, President.

Countersigned at Seattle, Washington the 1st day of July, 1910.

BRADLEY SHEPPARD
AGENT
BOISE, IDAHO

Hanford & Veuve General Agents.

Declarations

Statement 1.	Name of Assured <u>A. S. Whiteway & Company,</u> Address <u>Boise, Idaho.</u> <small>Street, Town and State.</small> Individual, co-partnership, corporation or estate? <u>Co-partnership.</u>					
Statement 2.	The Policy Period shall be from <u>June 27th,</u> 19 <u>10</u> to <u>June 27th,</u> 19 <u>11</u> at 12 o'clock noon, Standard Time, at Assured's address as to each of said dates.					
Statement 3.	A full description of the operations covered by this policy, the locations of all places where such operations are conducted, the estimated average number of employees engaged therein, the estimated compensation of such employees for the term of this policy, the premium rate or rates, and the estimated premium, are given hereunder:					
	Location of all places where business operations are to be conducted	Description of business Operations to be insured	Estimated Average No. of Employees	Estimated total Annual wages and Other Compensation	Rate per \$100 of wages	Estimated Premium
	<u>Between 10th & 11th Sts., on Main St., Boise, Idaho.</u>	<u>Constructing four story brick building:</u>				
		<u>Masons, bricklayers</u>	<u>10/20</u>	<u>1,000.00</u>	<u>2.25</u>	<u>22.50</u>
		<u>Carpenters</u>	<u>10/20</u>	<u>2,000.00</u>	<u>2.25</u>	<u>45.00</u>
	<u>Lot 4, Blk. 16.</u>	<u>Plasterers</u>	<u>5/10</u>	<u>800.00</u>	<u>1.20</u>	<u>9.60</u>
		<u>Painters</u>	<u>5/10</u>	<u>250.00</u>	<u>1.20</u>	<u>3.00</u>
		<u>Steel men</u>	<u>5/10</u>	<u>50.00</u>	<u>6.50</u>	<u>3.25</u>
		<u>Electric wiring</u>	<u>3/5</u>	<u>250.00</u>	<u>1.50</u>	<u>3.75</u>
		<u>Sheet metal workers</u>	<u>2/5</u>	<u>100.00</u>	<u>3.00</u>	<u>3.00</u>
	Special operations at all locations mentioned in this schedule.					
	Demolition or wrecking of buildings or structures.					
	Operation of locomotives or cars over railroads, rail road switches or sidetracks.					
	Total Estimated Premium— <u>Ninety and 10/100ths</u>				Dollars \$	<u>90.10</u>
Statement 4.	The Company's limit of liability, whether only one or more than one interest is covered by this policy, exclusive of expenses referred to in Paragraphs Two and Three of the insuring clause of the policy, for death or injury to one person shall be <u>Five Thousand and no/100ths</u> Dollars (\$ 5000.00) and subject to the same limit for each person, the Company's total liability (exclusive of said expense) on account of any one accident causing death or injury to more than one person, shall be limited to <u>Ten Thousand and no/100ths</u> Dollars (\$ 10000.00).					
Statement 5.	The foregoing enumeration of employees includes all persons in the service of the Assured in connection with the operations herein described at the places of such operations and elsewhere to whom compensation of any nature is paid or allowed, except the members of the Assured if a co-partnership, the President, Vice-President, Secretary or Treasurer if a Corporation, any drivers employed by the Assured who are covered in any concurrent Teams Policy carried in this Company, or persons wholly engaged in clerical or office duties. The foregoing estimated compensation is offered for the purpose of computing the estimated premium and shall include the entire compensation (by which is meant all salaries, wages, or other sums paid for regular time, over-time, piece work or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash) earned by all the employees in the service of the Assured engaged in connection with the operations hereinbefore described.					
Statement 6.	No further exclusion shall be made from the pay-roll, except as herein stated. <u>No exceptions.</u>					
Statement 7.	None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations and their estimated compensation and the premium rate are specifically stated herein.					
Statement 8.	No explosives are made, sold, kept, or used in the business described herein, except as herein stated. <u>No exceptions</u>					
Statement 9.	No operations of any nature not herein disclosed are conducted by the Assured at the places covered hereby, except as herein stated. <u>No exceptions</u>					
Statement 10.	The estimate of wages or other compensation does not include wages paid by independent sub-contractors, except as herein stated. <u>No exceptions</u>					
Statement 11.	No similar insurance has been declined or cancelled by any Company during the three years last past, except as herein stated. <u>No exceptions</u>					
Statement 12.	The minimum premium for this policy shall be <u>Fifty and no/100ths</u>				Dollars (\$	<u>50.00</u>)

Contractors' Employers'
Liability Policy

No. 27353

THE
Pennsylvania Casualty
Company

COAT OF ARMS—STATE OF PENNSYLVANIA

Issued to

A. S. Whiteway & Company

AGENCY OF

BRADLEY SHEPPARD
AGENT
BOISE IDAHO

Special attention is directed to the provisions of the Policy requiring immediate notice of all accidents, claims and suits.

READ YOUR POLICY CAREFULLY

Case No. 2297

U. S. Circuit Court of Appeals
For the Ninth Circuit.

Plaintiff's Exhibit 1

Received Aug 7 1913

F. D. MONCKTON,

Filed

Feb. 17, 1913

A. L. Richardson

Clerk U. S. District Court

ASSIGNMENT OF INTEREST BY ASSURED

The interest of _____ covered by this policy is hereby assigned to _____ subject to the consent of THE PENNSYLVANIA CASUALTY COMPANY, of Scranton, Pa. Dated at _____ this _____ day of _____ 19____

Signature of the Assured

Wages estimated for term from _____ 19____ to _____ 19____
Wages expended for term from _____ 19____ to _____ 19____
Balance, \$ _____

It being understood and agreed, that \$ _____ is the estimated wage expenditure for the remainder of the term of this policy, viz: from _____ 19____ to _____ 19____

Agreeing to an adjustment as per Condition A of this Policy, THE PENNSYLVANIA CASUALTY COMPANY, hereby consents that the interest of _____

covered by this Policy be assigned to _____

Dated at Scranton, Pennsylvania, this _____ day _____ 19____

Secretary

Policy of Insurance of Pennsylvania Casualty Co., Issued to Fred G. Mock.

FORM NO. 430 ED 8-09

No. 26472

THE PENNSYLVANIA Casualty Company

CHARTERED BY ACT OF ASSEMBLY OF PENNSYLVANIA

OF SCRANTON, PENNSYLVANIA

(HEREINAFTER CALLED THE COMPANY)

Does Hereby Agree with

- - - - - Fred G. Mock - - - - -

(HEREINAFTER CALLED THE ASSURED)

In Consideration of the payment of the premium as hereinafter provided and the Declarations on page three of this policy:

INDEMNITY

1. To Indemnify the Assured, subject to the limits expressed in Statement Four of the Declarations against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries, including death at any time resulting from such injuries accidentally sustained during the period of this Policy by reason of the business operations described and conducted at the locations named in said Declarations by all employees of the Assured as hereinafter provided.

SUITS, COSTS & EXPENSES

2. To Defend in the name and on behalf of the Assured any suits, even if groundless, which may at any time be brought on account of such injuries and to PAY all costs taxed against the Assured under any legal proceedings defended by the Company, all expenses incurred in the investigation of such injuries and in the negotiations for settlement, all expense of the contest of claims arising therefrom, and all interest on such part of any judgment as shall not be in excess of the limits of the Company's liability as hereinafter expressed.

SURGICAL RELIEF

3. To Reimburse the Assured for all expenses incurred by him for such immediate surgical relief as shall be imperative at the time any such injury is sustained

PERSONS & OPERATIONS COVERED

4. This Policy shall cover as above provided: (1) All such injuries sustained at the locations described in the Declarations by all employees of the Assured whose entire compensation is included in the estimated compensation as shown in Statement Three of the Declarations, including also drivers employed by the Assured who are specifically enumerated in any concurrent Teams policy carried by the Assured in this Company while such drivers are engaged in any duties other than those of a driver. (2) All such injuries sustained by such employees caused by any person wholly engaged in clerical or office duties, the Assured himself if the Assured is an individual, any member of the firm if the Assured be a firm, the President, Vice President, Secretary and Treasurer if the Assured be a Corporation, but injuries to the persons described in this clause shall not be covered unless the compensation paid to such persons is included in the estimated compensation. (3) All such injuries sustained by drivers, and their helpers, lumpers, stevedores, loaders, material handlers, time keepers, pay-clerks and messengers whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the service of the Assured in connection with the business operations described in the Declarations. This policy shall not cover injuries sustained by any person or persons except as above provided nor any injuries occasioned by reason of the failure of the Assured to observe any local ordinance of which he has knowledge, nor any injuries sustained or caused by any person employed by the Assured in violation of law as to age or under the age of fourteen years if there is no legal age limit, or by any contract convict laborer, nor liability of others assumed by the Assured under any contract or agreement, oral or written.

These Agreements are subject to the following conditions:

PREMIUM

A. The premium is based upon the entire compensation earned during the policy period by all employees of the Assured, not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this Policy. The premium is subject to adjustment at the termination of the policy or at the end of each period of one year if the policy be written for a longer term, when the Assured shall furnish to the Company for the purpose of said adjustment a written Declaration of the exact amount of compensation earned by the said employees during the said period. If the earned premium computed thereon at the rate or rates specified in Statement Three exceeds the estimated premium paid, or such portion of it as represents the premium for the annual period, the Assured shall immediately pay the additional amount to the Company; if less, the Company shall return to the Assured the unearned premium, but, except in the event of cancellation by the Company or by the Assured when the Assured is retiring from business, the Company shall receive or retain the minimum premium provided in Statement Twelve. The word "compensation" used in this paragraph shall include all salaries, wages and other sums paid for regular time, overtime, piecework or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash.

CANCELLATION

B. This policy may be cancelled by the Company at any time by written notice served on or sent by registered letter to the Assured at the address given herein, stating when the cancellation shall be effective. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata when determined. If cancelled by the Assured unless the Assured has retired from business, the Company shall receive or retain the customary short rate premium. In either case the earned premium shall be computed on the compensation for the year as indicated by the actual compensation earned by the employees of the Assured during the time the policy shall have been in force. In any case the Company shall receive or retain the minimum earned premium stated in Statement Twelve. The Company shall complete its estimate of the Assured's compensation as herein provided in Statement Twelve. The Company's estimate of the actual compensation earned by the employees of the Assured during the period the policy was in force shall have been furnished to the Company by the Assured.

INSPECTION

C. The Company shall be permitted at all reasonable times during the policy period to inspect the plant, works, machinery, and appliances covered by this policy, and to examine the Assured's books at any time during the policy period or any extension thereof, or within one year after its final expiration so far as they relate to the compensation earned by its employees while the policy was in force.

NOTICE

D. Upon the occurrence of an accident the Assured shall give immediate written notice thereof to the Company, or its duly authorized agent, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If thereafter any suit is brought against the Assured he shall immediately forward the Company every summons or other process served upon him. The Assured when requested by the Company shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals, and shall at all times render to the Company all co-operation and assistance in his power. He shall not voluntarily assume any liability, except as provided in Paragraph Three of the insuring clause, settle any claims or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceeding without the consent of the Company previously given in writing.

ASSURED'S
RIGHT OF
RECOVERY

E. No action shall lie against the Company to recover for any loss under Paragraph One of this Policy unless it shall be brought by the Assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety (90) days after the right of action accrues as herein provided.

SPECIAL
STATUTES

F. Any limitations or requirement of this Policy as respects time for notice of accident or for any legal proceeding conflicting with the law of the State in which the policy is issued shall be construed as amended to conform with such law.

ASSIGNMENT

G. No assignment of interest under this Policy shall bind the Company unless the consent of the Company shall be endorsed hereon.

CONCURRENT
INSURANCE

H. If the Assured shall carry a policy of another insurer, whether valid or not, against a loss covered by this Policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of his insurance.

SUBROGATION

I. In the case of payment of loss under this Policy, the Company shall be subrogated to all rights of the Assured against any person or corporation, as respects such loss, to the amount of such payment, and the Assured shall execute all papers required and shall co-operate with the Company to secure to the Company such rights.

WAIVERS AND
ALTERATIONS

J. No condition or provision of this Policy shall be waived or altered except by endorsement attached hereto signed by the President, Vice-President, Secretary or Assistant Secretary of the Company; nor shall any notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. The personal pronoun herein used to refer to the Assured shall apply regardless of number or gender.

WARRANTIES

K. Statements of the Declarations on page three of this Policy, numbers One to Twelve inclusive are warranted by the Assured to be true and correct except such as are declared to be matters of estimate only. This Policy is issued in consideration of and upon the faith of such warranties, the provisions of the policy respecting its premium and the payment of the premium as expressed in the Declarations.

In Witness Whereof, THE PENNSYLVANIA CASUALTY COMPANY of Scranton, Pa., has caused this policy to be signed by its President and Secretary at Scranton, Pa., and countersigned by a duly authorized agent of the Company.

F. H. Kingsbury, Secretary. *Thomas E. Jones*, President.

Countersigned at **Seattle, Washington** the **13th** day of **September** 19**09**
BRADLEY SHEPPARD
AGENT
BOISE, IDAHO
Hanford & Veuve General Agents.

This space is intended for the attachment of such endorsements as may be executed as provided in Paragraph J, and when so executed and attached they are to be construed as a part of the policy.

SHORT RATE CANCELLATION TABLE			
FOR TERM OF ONE YEAR			
	Per cent of Annual Prem		Per cent of Annual Prem
1 day	2	50 days	28
2 days	4	55	29
3	5	60	30
4	6	65	31
5	7	70	32
6	8	75	33
7	9	80	34
8	9	85	35
9	10	90	36
10	10	95	37
11	11	100	38
12	12	105	39
13	13	110	40
14	13	115	41
15	14	120	42
16	14	125	43
17	15	130	44
18	16	135	45
19	16	140	46
20	17	145	47
25	19	150	48
30	20	155	49
35	23	160	50
40	26	165	51
45	27	170	52
		175	53
		180	54
		185	55
		190	56
		195	57
		200	58
		205	59
		210	60
		215	61
		220	62
		225	63
		230	64
		235	65
		240	66
		245	67
		250	68
		255	69
		260	70
		265	71
		270	72
		275	73
		280	74
		285	75
		290	76
		295	77
		300	78
		305	79
		310	80
		315	81
		320	82
		325	83
		330	84
		335	85
		340	86
		345	87
		350	88
		355	89
		360	90
		365	91
		370	92
		375	93
		380	94
		385	95
		390	96
		395	97
		400	98
		405	99
		410	100

Declarations

Statement 1.	Name of Assured <u>Fred G. Mock,</u> Address <u>Nampa, Idaho.</u> <small>Street, Town and State.</small> Individual, co-partnership, corporation or estate? <u>Individual.</u>					
Statement 2.	The Policy Period shall be from <u>September 9th,</u> 19 <u>09</u> , to <u>September 9th,</u> 19 <u>10</u> , at 12 o'clock noon, Standard Time, at Assured's address as to each of said dates.					
Statement 3.	A full description of the operations covered by this policy, the locations of all places where such operations are conducted, the estimated average number of employees engaged therein, the estimated compensation of such employees for the term of this policy, the premium rate or rates, and the estimated premium, are given hereunder:					
	Location of all places where business operations are to be conducted	Description of business Operations to be Insured	Estimated Average No. of Employees	Estimated total Annual wages and Other Compensation	Rate per \$100 of wages	Estimated Premium
	<u>Nampa, Idaho.</u>	<u>Erection and construction of building corner of 1st and 13th Ave.,</u>				
		<u>Nampa, Idaho.</u>				
		<u>Bricklayers</u>	<u>5/10</u>	<u>500.</u>	<u>3.70</u>	<u>18.50</u>
		<u>Carpenters</u>	<u>5/10</u>	<u>1000.</u>	<u>2.70</u>	<u>27.00</u>
		<u>Common laborers</u>	<u>5/10</u>	<u>500.</u>	<u>1.50</u>	<u>7.50</u>
	Special operations at all locations mentioned in this schedule.					
	Demolition or wrecking of buildings or structures.					
	Operation of locomotives or cars over railroads, rail road switches or sidetracks.					
	Total Estimated Premium			<u>Fifty-three and no/100ths</u> Dollars \$ <u>53.00</u>		
Statement 4.	The Company's limit of liability, whether only one or more than one interest is covered by this policy, exclusive of expenses referred to in Paragraphs Two and Three of the insuring clause of the policy, for death or injury to one person shall be <u>Five Thousand and no/100ths</u> Dollars (\$ <u>5000.00</u>) and subject to the same limit for each person, the Company's total liability (exclusive of said expense) on account of any one accident causing death or injury to more than one person, shall be limited <u>Ten Thousand and no/100ths</u> Dollars (\$ <u>10000.00</u>).					
Statement 5.	The foregoing enumeration of employees includes all persons in the service of the Assured in connection with the operations herein described at the places of such operations and elsewhere to whom compensation of any nature is paid or allowed, except the members of the Assured if a co-partnership, the President, Vice-President, Secretary or Treasurer if a Corporation, any drivers employed by the Assured who are covered in any concurrent Teams Policy carried in this Company, or persons wholly engaged in clerical or office duties. The foregoing estimated compensation is offered for the purpose of computing the estimated premium and shall include the entire compensation (by which is meant all salaries, wages, or other sums paid for regular time, over-time, piece work or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash) earned by all the employees in the service of the Assured engaged in connection with the operations hereinbefore described.					
Statement 6.	No further exclusion shall be made from the pay-roll, except as herein stated. <u>No exceptions.</u>					
Statement 7.	None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations and their estimated compensation and the premium rate are specifically stated herein. <u>No exceptions</u>					
Statement 8.	No explosives are made, sold, kept, or used in the business described herein, except as herein stated. <u>No exceptions</u>					
Statement 9.	No operations of any nature not herein disclosed are conducted by the Assured at the places covered hereby, except as herein stated. <u>No exceptions</u>					
Statement 10.	The estimate of wages or other compensation does not include wages paid by independent sub-contractors, except as herein stated. <u>No exceptions</u>					
Statement 11.	No similar insurance has been declined or cancelled by any Company during the three years last past, except as herein stated. <u>No exceptions</u>					
Statement 12.	The minimum premium for this policy shall be			<u>Fifty and no 100ths</u> Dollars \$ <u>50.00</u>		

This policy is hereby surrendered and ordered cancelled this 15th day of Feb., 1910, releasing the company from all further obligations.

FRED G. MOCK,
Assured.

**Contractors' Employers'
Liability Policy**

No. 26472

**THE
Pennsylvania Casualty
Company**

COAT OF ARMS—STATE OF PENNSYLVANIA

Issued to

Fred C. Mock

AGENCY OF

BRADLEY SHEPPARD

AGENT

BOISE

IDAHO

Special attention is directed to the provisions of the Policy requiring immediate notice of all accidents, claims and suits.

==
READ YOUR POLICY CAREFULLY

Case No. 2297

U. S. Circuit Court of Appeals
For the Ninth Circuit.

Defendant's Exhibit 4

Received Aug 7 1913

F. D. MONCKTON, Clerk

ASSIGNMENT OF INTEREST BY ASSURED

The interest of _____ covered by this policy is hereby assigned to _____

subject to the consent of THE PENNSYLVANIA CASUALTY COMPANY, of Scranton, Pa

Dated at _____ this _____ day of _____ 19 _____

Signature of the Assured

Wages estimated for term from _____ 19 _____ to _____ 19 _____ \$ _____

Wages expended for term from _____ 19 _____ to _____ 19 _____ \$ _____

Balance, _____ \$ _____

It being understood and agreed, that \$ _____ is the estimated wage expenditure for the

remainder of the term of this policy, viz.: from _____ 19 _____ to _____ 19 _____

_____ 19 _____, and the said _____ Assigned

agreeing to an adjustment as per Condition A of this Policy, THE PENNSYLVANIA CASUALTY

COMPANY, hereby consents that the interest of _____

covered by this Policy be assigned to _____

Dated at Scranton, Pennsylvania, this _____

_____ day

of _____ 19 _____ Secretary

14
UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE NINTH CIRCUIT

OCTOBER TERM, 1913.

PENNSYLVANIA CASUALTY COMPANY, PLAINTIFF
IN ERROR,

VS.

A. S. WHITEWAY AND C. H. LEE, CO-PARTNERS AS
A. S. WHITEWAY & COMPANY, DEFEND-
ANTS IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

BRIEF OF DEFENDANTS IN ERROR

STATEMENT OF THE CASE.

On the first day of July, 1910, the plaintiff in error made, executed and delivered to the defendants in error a certain policy of insurance, a copy of which is set forth in the transcript as plaintiff's Exhibit Number One, under the terms of which it agreed: (1) To indemnify the Assured, subject to the limits expressed in Statement Four of the Declarations against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries, including death at any time resulting from such injuries accidentally sustained during the period of this Policy by reason of the business operations described and conducted at the locations named in said Declarations by all employees

of the Assured as hereinafter provided; (2) To defend in the name and on behalf of the Assured any suits, even if groundless, which may at any time be brought on account of such injuries and to pay all costs taxed against the Assured under any legal proceedings defended by the Company, all expenses incurred in the investigation of such injuries and in the negotiations for settlement, all expense of the contest of claims arising therefrom, and all interest on such part of any judgment as shall not be in excess of the limits of the Company's liability as hereinafter expressed.

The policy was from June 27th, 1910, to June 27th, 1911. That while this policy was in full force and effect, one J. C. Irwin, in the employ of the defendants in error at the place mentioned in said policy of insurance, and while working thereat, received bodily injuries accidentally sustained, and that thereafter, on the 13th day of March, 1911, the said J. C. Irwin commenced an action in the District Court of the Third Judicial District of the State of Idaho against the defendants in error herein, to recover the sum of \$15,656.00 as damages for said injuries accidentally sustained by said J. C. Irwin on the 25th day of July, 1910. That these defendants in error requested the plaintiff in error herein to defend said action in the name of and on behalf of the said defendants in error, and that said plaintiff in error herein neglected and refused to do so. That thereupon the defendants in error herein employed counsel, filed their answer, denying the material allegations of the said complaint of J. C. Irwin, and, the action coming on for trial, resulted in a verdict in favor of said J. C. Irwin and against the defendants in error herein for the sum of \$7500. That on the 26th day of December, 1911, the defendants in error herein paid in money in satisfaction of said judgment the sum of five thousand dollars; that thereafter this present action was commenced in the state court to recover from

the said plaintiff in error, the said sum of five thousand dollars so paid as aforesaid by defendants in error, together with their attorney's fees and costs incurred in the prior action and for the costs of this suit. Upon application of the plaintiff in error, the case was transferred and removed to the United States District Court for the Southern Division of the District of Idaho for trial. A stipulation in writing having been filed waiving a jury, the case was tried to the judge without a jury. After having heard all the evidence in the case and the arguments of counsel thereon, the district judge rendered judgment in favor of the defendants in error herein for the said sum of five thousand dollars, attorney's fees and costs. From this judgment plaintiff in error has sued out this writ of error.

ARGUMENT.

Although the answer of the plaintiff in error set forth several matters by way of defense, upon the trial of the action, it rested upon the one question as to whether or not J. C. Irwin, the person who was injured, was a "steel" man, and covered by the terms of the policy, under that classification. The complaint alleged that he was a "steel" man and this allegation was denied by the answer. Evidence was taken upon this question and upon conflicting evidence, the trial court found as a fact that he was a "steel" man and therefore within the terms of the policy. This action being tried to the court without a jury, under a stipulation waiving the same, we contend that this finding of the trial court is conclusive. The question whether or not at the close of the trial there is substantial evidence to sustain a finding or judgment in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial by the court without a jury, it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court

which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, and if no finding is filed before, when the judgment is rendered. There was no such request made by the plaintiff in error in this case. In the case of the United States Fidelity & Guaranty Company v. Board of Commissioners, 145 Fed. 144, on page 151, the Circuit Court of Appeals of the Eighth Circuit say:

“The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered. *Clement v. Insurance Co.*, 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; *Merchantile Trust Co. v. Wood*, 60 Fed. 346, 348, 8 C. C. A. 658, 659; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 96, 13 Sup. Ct. 485, 37 L. Ed. 380; *Ward v. Joslin*, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; *The Francis Wright*, 105 U. S. 381, 387, 26 L. Ed. 1100; *The City of New York*, 147 U. S. 72, 76, 77, 13 Sup. Ct. 211, 37 L. Ed. 84; *Laing v. Rigney*, 160 U. S. 531, 540, 16 Sup. Ct. 366, 40 L. Ed. 525; *Martinton v. Fairbanks*, 112 U. S. 670, 672, 673, 5 Sup. Ct. 321, 28 L. Ed. 862; *Dooley v. Pease*, 180 U. S. 125, 131, 21 Sup. Ct., 329, 45 L. Ed. 457; *Insurance Co. v. Folsom*, 18 Wall. 237, 252, 21 L. Ed. 827; *Hathaway v. Cambridge National Bank*, 134 U. S. 494, 498, 10 Sup. Ct. 608, 33 L. Ed. 1004; *Runkle v. Burnham*, 153 U. S. 216, 225, 14 Sup. Ct. 837, 38 L. Ed. 694; *Case Mfg. Co. v. Soxman*, 138, U. S. 431, 438, 11 Sup. Ct. 360, 34 L. Ed. 1019. No motion, request or act of this nature is recorded in the case in hand, so that the

question of the sufficiency of the evidence to sustain the finding and judgment is not open for consideration in this court. *Martinton v. Fairbanks*, 112 U. S. 670, 672, 673, 5 Sup. Ct. 321, 28 L. Ed. 862; *Dooley v. Pease*, 180 U. S. 126, 131, 21 Sup. Ct. 329, 45 L. Ed. 457; *Wilson v. Merchants' Loan & Trust Co.*, 183 U. S. 121, 127, 22 Sup. Ct. 55, 46 L. Ed. 113; *Hoge v. Magnes*, 85 Fed. 355, 358, 29 C. C. A. 564, 567; *Barnard v. Randle* 49 C. C. A. 177, 180, 110 Fed. 906, 909; *York v. Washburn*, 129 Fed. 564, 566, 64 C. C. A. 132, 134.

"The finding of the court was general and was in favor of the defendant. Like a verdict of a jury it concludes all issues of fact and all mixed questions of fact and law save the questions of law reserved by demurrer, motion, request, or exception. No questions of law were reserved which have not been considered and decided.

"The judgment below must therefore be affirmed, and it is so ordered."

See also *Seep v. Ferris-Haggarty Copper Mining Co.*, 201 Fed. 893; *National Surety Co. v. U. S.* 200 Fed. 142.

Counsel for plaintiff in error, in their brief, have devoted considerable time and taken up a considerable portion of their brief in an effort to convince this court that J. C. Irwin, the party who was injured, was not covered by the terms of the policy but, as counsel made no request in the trial court for a direct ruling upon this question, under the authorities above cited, this court is now precluded from considering the question.

We desire to call the court's attention to the fact that plaintiff in error has set forth eleven assignments of error, and that the record discloses the fact that the only exception taken by counsel to the rulings of the court was the exception taken to the first assignment of error. It is true that counsel entered objections to the action of the court

in respect to the other ten assignments of error, but took no exception whatsoever to the ruling of the court. Therefore, we contend that these matters are not open for review in this court. We do find in the record that during the progress of the trial, the trial judge made the following remark: "I may say that you have exceptions to all adverse rulings of the court." It is hardly fair to presume that the court meant by this remark that it was unnecessary for counsel to ask for an exception to the rulings of the court, but that the court intended by such a remark that the court should grant without any request therefor an exception to each and every ruling during the progress of the trial and under the statute and rules of practice in the federal courts, as we understand them, the court would have no power to make such a rule; and that such was not the understanding of the parties we find on page 120 of the transcript that a "stipulation was entered into between counsel for the respective parties that all objections made and exceptions taken during the progress of the trial might be embodied in a bill of exceptions or statement on motion for a new trial, to be thereafter prepared, the same to have force and effect as if settled in a bill of exceptions upon the trial." Revised Statutes, Sec. 700 (U. S. Comp. St. 1901, p. 570) provides, among other things: "When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury * * * the rulings of the court in the progress of the trial of the case ~~and~~ *excepted to at the time* (italics are ours) and duly presented by a bill of exceptions may be reviewed by the supreme court upon a writ of error or upon appeal."

In the case of the Board of Commissioners v. Home Savings Bank, 200 Fed. 28, the Circuit Court of Appeals for the Eighth Circuit say:

"The office of an exception in practice is to challenge

the correctness of the rulings or decisions of the trial court promptly when made to the end that errors in such rulings may be corrected by the court itself, if, upon its attention being called thereto, it deems them to be erroneous and to lay the foundation for further review if necessary by the proper appellate tribunal. In the courts of the United States such exception taken immediately upon the ruling being made is indispensable to a review by the proper appellate court of the ruling. *Railway Co. v. Heck*, 102, U. S. 120, 26 L. Ed. 58; *Newport News, etc. Co. v. Pace*, 158 U. S. 36; *Potter v. U. S.* 122 Fed. 49."

In the case of *Gibson v. Luther*, 196 Fed. 203, the court say:

"As the trial progressed, objections of vital and controlling importance were interposed to the introductions of deeds and other documentary evidence, but these objections were not passed upon by the court, and no exceptions were saved by either party to any adverse ruling thereon. This precludes a review of any of these rulings, as we can act only on exceptions duly saved and assignments of error predicated thereon.

"There was an agreement between counsel that they might proceed with the introduction of their evidence, making formal objections as they went along, to such as they desired to object to, and 'that the court should reserve its ruling and take all matters up in the general argument.' Whether this agreement contemplated that the court should make definite rulings on the specific objections made or should make a comprehensive ruling after the final argument, in the judgment rendered, is uncertain. On this subject the agreement is not clear. It does not appear that the court consented to this arrangement of counsel. On the contrary, it appears that neither party ever asked or insisted that the court rule on the objections so made, and it appears that the court never did rule on them, except as its view of them might be inferred from the

judgment ultimately rendered in the case.

“Objections of this kind, unaccompanied by rulings or exceptions, present nothing for review by an appellate court. In the case of *Ogden City v. Weaver*, 47 C. C. A. 485, 488, 108 Fed. 564, 567, which was an action at law in which a former decree in a state court had been offered in evidence, Judge Thayer, speaking for this court, said:

“‘The record and decree in the case pending in the state court seem to have been offered below; that is to say, by *Ogden City*. They were objected to at the time by the receiver, and the bill of exceptions recites that they were admitted ‘subject to objection,’ the trial court undertaking to rule on their admissibility afterwards. We are not advised by the bill of exceptions whether they were eventually admitted or rejected. Neither are we informed except by the opinion of the trial judge, which, as already stated, forms no part of the record, what the view of the trial court was with respect to the finality of the decree. In this condition of the record, we might well decline to notice the contention above stated,’ etc.

“In the case of *Fidelity & Casualty Co. v. Thompson*, 83 C. C. A. 324, 325, 154 Fed. 484, 485, (11 L. R. A. (N. S.) 1069, 12 Ann. Cas. 181), in which two motions for a directed verdict were made, one at the close of plaintiff’s evidence and the other at the close of all the evidence, Mr. Justice Van Devanter, then Circuit Judge, speaking for this court said:

“‘The second motion was also waived, because a direct ruling thereon was not insisted upon, and no exception was reserved in that connection’—citing *Newport News, etc. Co. v. Pace*, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887, and *National Bank of Boyertown v. Schufelt*, 76 C. C. A. 187, 145 Fed. 509.

“The doctrine of the foregoing cases is fully supported by the case cited from the Supreme Court (*Newport*

News, etc. v. Pace) wherein the late Chief Justice, speaking for that court, said:

“ ‘Errors are assigned to the admission of evidence against defendant’s objection, and notwithstanding objection by the defendant, but the bill of exceptions does not show any exception taken to the overruling of these objections. It is also claimed that in a particular instance evidence offered by defendant was improperly excluded on plaintiff’s objection, but no exception to the action of the court appears to have been preserved.’ ”

“It thus appears that an objection in order to form the basis of an assignment of error must be pressed to the extent of securing a ruling upon it by the trial court. It is a ruling only that can be challenged, and as said by us recently in the case of Mexico International Land Co. v. Larkin, 195 Fed. 495, 115 C. C. A. —, just decided:

“ ‘The ruling of which complaint is made should be challenged, not only by an objection, but by an exception taken and recorded at the time, to the end that the attention of the trial judge may be sharply called to the question presented, and that a clear record of his action and its challenge may be made.’ ”

The court cannot take an exception on behalf of either party. Counsel must themselves take the exception at the time of the ruling of the court and it must affirmatively appear in the record that counsel “then and there excepted” to such ruling.

Walton v. United States, 9 Wheat. 651, 6 L. Ed. 182;

Brown v. Clarke, 4 How. 4, 11 L. Ed. 850;

Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643;

Turner v. Yates, 16 How. 14, 14 L. Ed. 824;

United States v. Breitling, 20 How. 252; 15 L. Ed. 900;

Barton v. Forsyth, 20 How. 532, 15 L. Ed. 1012;
 New Orleans etc. Ry. Co. v. Jopes, 142 U. S. 18,
 35 L. Ed. 919.

The rule is well established and of long standing that an exception to be of any avail must be taken at the trial. It may be reduced to form and signed afterwards, but the fact that it was seasonably taken must appear affirmatively in the record by a bill of exceptions duly allowed or otherwise.

French v. Edwards, 13 Wall. 506, 20 L. Ed. 702;
 Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983;
 Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113;
 United States v. Carey, 110 U. S. 51, 52, 28 L.
 Ed. 67.

The trial court committed no error in permitting the witness Lee to testify as to what employees compensation was included in the payments \$90.10 and \$34.80, the premium which was paid to the plaintiff in error on its policy of insurance, for the reason: that the policy itself, in statement No. 4 contains the following provision: "This policy shall cover as above provided: (1) all such injuries sustained at the locations described in the declarations by all employees of the assured whose entire compensation is included in the estimated compensation as shown in Statement 3 of the declarations. (3) All such injuries sustained by drivers and their helpers, lumpers, stevedores, loaders, material handlers, time-keepers, pay-clerks and managers, whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the service of the assured in connection with the business operations described in the declaration."

Again, in Condition "A" of the policy of insurance it is stated as follows:

“A. The premium is based upon the entire compensation earned during the policy period by all employees of the Assured not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this policy.”

And statement 5 of the declarations of said policy again specifically states that the policy covers all employees in the service of the assured whose entire compensation is included for the purpose of estimating the premium on said policy.

That the court committed no error in permitting the witness Lee to testify as to what compensation was taken into consideration in estimating the premium due the company and that it committed no error in permitting the witness to testify that the said J. C. Irwin was a “steel” man, and thus within the express terms of the contract of insurance, has been decided by the Circuit Court of Appeals of the Seventh Circuit in the case of Fidelity & Casualty Co. of New York v. Phoenix Manufacturing Co., 100 Fed. 604. As the opinion of the court in this case is not lengthy, I will cite the same in full.

In the above case the court say:

“Grosscup, Circuit Judge, after stating the facts, delivered the opinion of the court.

“It is clear to us that at the time the contract for indemnity was entered into the defendant in error was engaged in a general business that included the tearing down of buildings preparatory to the construction of new ones; that the scope of its business in this particular was well known in the community; that the purpose of defendant in error in taking out the insurance was to obtain indemnity against losses by accident in this as well as in other lines of its general business; that the pay roll, made the basis for the premium rate, was meant to include the employees thus engaged;

and that the occupations described in the application were meant by the insured to include, and did include, the employes thus employed. This evidence was all submitted to the jury, and, though not specifically commented upon in the instructions of the court, must have entered into the deliberations and finding of the jury. Upon this evidence, if, indeed, not upon the face of the policy itself, the jury, in our opinion, was clearly justified in finding that the men injured—carpenters—were, at the time of the injury, engaged in one of the occupations covered by the policy of insurance. The trial in the circuit court seems to have gone off mainly upon the conception that clause 4 of the application, relating to the trade and business of the insured, controlled the scope of the insurance; and that, unless the occupations of the men injured were within a fair interpretation of such clause, the plaintiff in error would not be liable. This clause of the application does not, in our opinion, give substantial scope and effect to the insurance. At most it is only a clause of representation or warranty. If, in that attitude, it deceived, or was calculated to deceive, the insurance company, the policy might thereby be avoided; but the evidence submitted shows, and the jury, upon instructions certainly in favor of the insurance company, found, that the term ‘general woodwork’ was commonly understood to include the character of work upon which the employes injured were, at the time, engaged, and that at the time the policy was taken out the state agent of the insurance company, writing up the application, not only so interpreted it, but himself suggested it as a term broad enough to cover every line of business in which the defendant in error was then engaged. Whatever, therefore, may be the technical meaning of clause 4, the court was well within the authority of *Insurance Co. v. Mahone*, 21 Wall. 152, 22 L. Ed. 593, and *Insurance Co. v. Baker*, 94 U. S. 610, 24 L. Ed. 268, in holding that it was not necessarily unambiguous, and in submitting its meaning, as commonly understood, and as agreed upon by the parties, to the jury, as one of the questions of fact in the case. We see no error, in this respect, either

in the admission of the evidence objected to or in the instructions applied by the court. Indeed, looking upon this clause as one of representation only, and not as the clause of the application that gave scope to the insurance, the charge of the court appears to have been much more favorable to the plaintiff in error than, under our view of this case, it ought to have obtained. If the court below mistook clause 4,—a merely incidental issue,—as we view it, for the substantial issue in the case, the injury arising therefrom affected the insured, and not the insurer. If an error, it did not prejudice the case of the plaintiff in error.

“Nor was there any error in admitting the receipt for the excess premium, and in submitting it as one of the facts to the jury. It was clearly pertinent to show to what extent the parties understood the pay roll, as covering the employees injured in the accident.

“On the whole case, after a careful examination of all the evidence submitted, we are of the opinion that the defendant in error was entitled to recover upon the policy of insurance, that the verdict of the jury is clearly sustained, and that there was no error in the trial in the circuit court that in any degree prejudiced the cause of the plaintiff in error. The judgment will be affirmed.”

The plaintiff in error set forth in its answer in this action as one of its defenses, the fact that A. S. Whiteway, one of the members of the co-partnership of A. S. Whiteway & Company, had accepted service of a notice of the accident to said J. C. Irwin and that by so doing he had violated the terms and conditions of the Insurance policy. This notice of accident is provided for by the statutes of Idaho, laws of 1909, Section 5. It applies solely to an action brought under this statute for injuries received. As a matter of fact, J. C. Irwin, in his complaint against A. S. Whiteway & Company, set forth three causes of action; two were based upon this statute and the third cause of action was the common

law action for injuries received. Upon the trial of this action in the district court counsel for A. S. Whiteway & Company moved the court to compel the plaintiff, J. C. Irwin, to elect upon which count he would ask for judgment, and he elected to stand upon the third cause of action stated in his complaint which was the common law action, and he recovered on said third count. This being true, the giving or receiving of this statutory notice in no wise affected injuriously or otherwise the plaintiff in error herein. These facts were shown in the trial court by the judgment roll, introduced in evidence of the trial of the action of J. C. Irwin against A. S. Whiteway & Company and by the introduction in evidence of plaintiff's Exhibit No. 8, a stipulation, found in the transcript herein at page 119. There can be no doubt that said J. C. Irwin had a right to waive the statutory cause of action and rely and recover upon the common law count. The statute of this state, enlarging the common law right of action for injuries, was taken from the statute of Massachusetts and has been construed by that state as not in any manner curtailing the common law right of action. In *Ryalls v. Mechanics Mills*, 150 Massachusetts, 190, the court, in the syllabi, say:

"In these cases within the words of the employers' liability act, Statutes 1887, Chap. 270, in which the common law gives an injured employee a remedy against his employer, he may still sue under the same conditions and recover damages to the same extent as if the statute had not been passed.

"The requirements of notice in Section 3 of such act only apply so far as Section 1 is concerned to the cases lying outside the common law rule, but embraced by Section 1, unless the plaintiff, although having the common law remedy, insists on relying upon the statute alone."

And in *May v. Whittier*, 27 N. E. 768, the same court say:

“Assuming for the sake of the argument that in some cases the plaintiff would have a right to go to the jury upon both a statutory and a common law count, in view of the different possible findings on his evidence (*Ryalls v. Mechanics Mills*, 150 Mass. 190, 22 N. E. 766; *Whiteside v. Brawley*, 152 Mass. 133), the plaintiff was not injured by being required to elect in the case at bar.”

Clark v. Merchants & Miners Transportation Co.,
24 N. E. 49.

And in the case of *Denver & R. G. Ry. Co. v. Norgate*, 141 Fed. 247, the Circuit Court of Appeals for the Eighth Circuit, in speaking of this act say:

“The right of Norgate to institute the present action against the railroad company existed at common law, and in regard to such action we do not understand that said section 4 of the act of 1893 applies. No mention is made in the complaint in this action of a statute of Colorado, and it ought not to be held that a statute enacted to enlarge the liability of the master has resulted in restricting it, unless such a result is unavoidable. In *Ryalls v. Mechanics Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667, the Supreme Court of Massachusetts had occasion to construe a similar law of that state, and held that in those cases within the words of the statute in which the common law gives an employe a remedy, he still has a right to sue under the same conditions, and to recover damages to the same extent as if the statute had not been passed, and that the requirement in regard to notice only applied to those cases lying outside the common-law rule. We do not feel sure that the question as to the proper construction of the act of 1893 with reference to the point under discussion is an open one, as the Supreme Court of Colorado in *Colorado M. & E. Co. v. Mitchell*, 26 Colo. 285, 58 Pac. 28, construed said act, and held that it in no manner prejudiced the common-law rights of employes, or interfered with the enforcement of any right that the statute itself did not create. Massachu-

setts copied the statute from England, and Colorado from Massachusetts. At the place of its origin and adoption it has received the same construction."

The sixth assignment of error set forth in the brief of the plaintiff in which it is alleged that the court refused to allow the witnesses Hammond and Paradice to testify that a man doing such work as Irwin was doing at the time he was injured was generally and commonly known as a "common laborer" cannot be sustained, first, for the reason that no exception was taken at the time of the trial to the action of the trial court in regard to this matter; and second, the witness Hammond was permitted to answer all questions of the above character propounded to him by counsel for the plaintiff in error. In regard to the witness Paradice, upon an inspection of the record, the witness did testify as to his understanding of the term "steel-man" when used in regard to the erection of buildings, and was permitted to answer the same over the objection of counsel for the defendant in error (tr. p. 92). He also testified over the objection of counsel for the defendant in error as to his understanding of the term "common laborer" (tr. p. 92).

It is a cardinal rule in the construction of contracts that the court should, as far as possible, put itself in the place of the parties at the time the contract was entered into and find out, if possible, what was their intention in regard to any particular provision of said contract. Now, in this case, the uncontradicted evidence shows that technically speaking "steel-men" are not employed in the erection of buildings, but structural steel workers are, so that the only persons who could possibly come under the classification in this policy as "steel men" would be the structural steel workers. The witnesses Paradice and Dean, both called on behalf of the plaintiff in error, testified as follows:

"Q. Mr. Paradice, in the erection of buildings such as he stated, a four-story building in this city, do they

employ 'steel-men', structural steel-men? A. Structural steel-men.

"Q. You don't know of such a thing as a steel-man being employed in that particular trade. A. No, I do not." (tr. p. 93).

And the witness Dean testifies:

"Q. Do you know what the term steel-man or steel-men in the building trade or business signifies as a class of workmen? A. Structural steel erectors." (tr. p. 98).

We again desire to call the attention of the court to the case of the United States Fidelity & Guaranty Company v. Board of Commissioners, 145 Fed., at page 148, where the rule to govern a court in the construction of contracts of this character is stated as follows:

"A surety is a favorite of the law, and he is never liable beyond the strict terms of his obligation. But his contract is, after all, nothing but an agreement, and like all other agreements, it must have a just and rational interpretation. The purpose of every written contract is to express the intention of the parties. The object of all construction of agreements is to ascertain that intention to the end that it may be enforced. The court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances which conditioned its making endeavor to ascertain what they intended to agree to do—upon what sense or meaning of the terms they used their minds actually met. *Accumulator Co. v. Dubuque St. Ry. Co.*, 12 C. C. A. 37, 41, 42, 64 Fed. 70, 74; *City of Salt Lake v. Smith*, 104 Fed. 457, 462, 43 C. C. A. 637, 643; *Fitzgerald v. First National Bank*, 52 C. C. A. 276, 284, 114 Fed. 474, 482. That intention must be deduced not from specific provisions or fragmentary parts of the instrument, but from the entire agreement, because the intent is not evidenced by any part or provision of it, nor by the in-

strument without any part or provision, but by every part and term so construed as to be consistent with every other part and with the entire contract. *Jacobs v. Spalding*, 71 Wis. 177, 189, 36 N. W. 608; *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415; *Canal Co. v. Hill*, 15 Wall, 94, 21 L. Ed. 64; *O'Brien v. Miller*, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469; *Pressed Steel Car Co. v. Eastern Ry. Co.*, 57 C. C. A. 635, 637, 121 Fed. 609, 611; *Uinta Tunnel, etc., Co. v. Ajax Gold Min. Co.*, (C. C. A.) 141 Fed. 563. The actual intent of the parties when thus ascertained must prevail over the dry words, inapt expressions, and careless recitations in the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement. *Pressed Steel Car. Co. v. Eastern Ry. Co.*, 57 C. C. A. 635, 637, 121 Fed. 609, 611; *Uinta Tunnel, etc. Co. v. Ajax Gold Min. Co.* (C. C. A.) 141 Fed. 563; *Wilson v. Bevan*, 62 Eng. Com. Law, 684; *Lewis v. Tipton*, 10 Ohio St. 88, 90, 75 Am. Dec. 498."

Respectively submitted,
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